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REPORTS OF CASES

DECIDED IN

# THE SUPREME COURT

OF THE

STATE OF UTAH

W. S. DALTON  
REPORTER

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VOLUME LV.

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OF  
THE SUPREME COURT  
OF THE  
STATE OF UTAH

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TERMS OF COURT  
SECOND MONDAY IN FEBRUARY      SECOND MONDAY IN MAY  
SECOND MONDAY IN OCTOBER

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(Including the Counties of Garfield, Kane, Piute, Sevier and Wayne)  
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(Including the Counties of Carbon, Emery, Grand, San Juan  
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The terms of the United States District Court of Utah are held as follows: At Salt Lake City, second Monday in April and November; at Ogden, second Monday in March and September.

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REPORTS OF CASES  
DECIDED IN  
THE SUPREME COURT  
OF THE  
STATE OF UTAH

(Continued from Volume 54)

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FARMER v. CHRISTENSEN et al.

No. 3280. Decided July 9, 1919. (183 Pac. 328.)

1. PARENT AND CHILD—RIGHT TO CUSTODY. Other things equal, the natural parent of a child is entitled to its care, custody, and control, but may by agreement or conduct deprive himself of his natural right to confer it upon others; the guiding principle always being the best interests of the child for the present and future.<sup>1</sup> (Page 5.)
2. PARENT AND CHILD—RIGHT TO CUSTODY. Divorced father of boy living with his maternal grandmother and his mother's second husband *held* entitled to the custody of the boy in order that he might be adopted by his father's sister and her husband, fit persons by character and means, and anxious to have the child, despite a strong affection between the boy and his stepfather and grandmother. (Page 7.)

Appeal from District Court, Third District, Salt Lake County; *R. B. Porter*, Judge.

Suit by George F. Farmer against John W. Christensen and another. From judgment for petitioner, defendants appeal.

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<sup>1</sup> *Stanford v. Gray*, 42 Utah, 228, 129 Pac. 423, Ann. Cas. 1916A, 989; *Hummel v. Parish*, 43 Utah, 373, 134 Pac. 898,

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Farmer v. Christensen et al., 55 Utah 1.

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REMANDED with directions to strike a finding from the record, and judgment otherwise AFFIRMED conditionally.

*Rogers & Haas* of Salt Lake City, for appellants.

*Ray Van Cott* of Salt Lake City, for respondent.

GIDEON, J.

George F. Farmer filed a petition in the district court of Salt Lake county, Utah, against John W. Christensen and Mrs. G. A. Almquist, designated herein as defendants. The petitioner alleged that Joseph Harry Farmer, of the age of ten years is his son and is unlawfully detained and restrained of his liberty by defendants. Defendants answered, admitting that petitioner is the father of the child, but denied his right to its custody, and also denied that said child was unlawfully restrained by them. A hearing was had before the district court, and the custody of the minor awarded to petitioner. From that judgment defendants appeal.

The petitioner, in the year 1902, was married to Emma Farmer, the mother of the child. Two children were born of that marriage, a son now fourteen years of age and the child involved in this litigation, who was ten years old in September, 1917. The eldest son, not in any way involved in these proceedings, at the age of two and one-half years, became seriously sick with spinal meningitis. That disease left him entirely deaf. During such sickness he was taken to the home of a Mrs. Jacobsen, a sister of petitioner, and he has remained in that home and been cared for by that worthy woman and her husband ever since. The petitioner has at no time contributed to the support of this afflicted son. Petitioner and his wife lived together until 1909. During that year the mother of the child refused to continue the marital relation with the petitioner, and thereafter, in the year 1912, filed a complaint for divorce in the district court of Salt Lake county, charging cruel treatment and failure to provide her with the common necessities of life. A decree of

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Appeal from Third District.

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divorce was granted plaintiff, the former wife of petitioner herein. She was awarded custody of the two children. Subsequent to that, in the year 1915, the mother of the child married defendant John W. Christensen. The mother was then in poor health, and thereafter, in the fall of 1916, died. From and prior to the date of the marriage, the minor child had been a member of the household of Christensen, and said minor has since said time, at the date of filing this petition, and at the date of trial, resided, and at this time resides, at the home of said Christensen. The defendant Mrs. Almquist is the mother of the former wife of Farmer and grandmother of the child. Said grandmother, after the marriage of Christensen and the boy's mother, resided and had her home with them. She has continued since the death of her daughter to reside at the home of said Christensen and has cared for and been the companion of the boy during all that time. A strong attachment and affection exist between the grandmother and the child as well as between the child and defendant Christensen. The boy is, for such reason, extremely anxious that he be permitted to continue to make his home with his said grandmother and stepfather.

The petitioner is a resident of Idaho. He has never remarried. He frankly admitted during the trial that he is not situated so that he can provide a good home for his son Joseph or give him the care and attention that he desires the child should have. It also appears, and is so stated by the petitioner, that he desires that the boy shall be adopted by one Samuel M. Taylor and his wife, Ada F. Taylor, residents of Salt Lake City. It likewise appears in the record that the father, prior to trial, executed the necessary relinquishment of said minor child and consented that he might be adopted by Taylor and wife. Mr. and Mrs. Taylor are well-to-do people, about forty years of age, and have no children of their own. They own a good home. Mr. Taylor has an income of \$2,500 a year independent of his wife's income. He testified, and that is not disputed, that he has property worth \$20,000. Said Taylor and wife, in their testimony, expressed a very ardent desire to adopt this boy and make him their

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Farmer v. Christensen et al., 55 Utah 1.

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heir. They both expressed a liking and affection for the child and felt sure that they could do better for him in the way of furnishing a home, education, and general moral training than he would likely receive from those in whose custody he now is.

The grandmother is now over seventy years of age. The stepfather was thirty-one at the date of trial. The grandmother is without property, and, the district court found, is quite feeble. Mr. Christensen owns his home and has some other property. He is an industrious, and, as appears from the record, a very kind and considerate man. He is deeply attached to the boy, and the district judge stated in summing up the case that his conduct toward and treatment of the child have been most considerate; that because of said conduct and treatment there has grown up between him and the boy a strong attachment, and the boy, for that reason, is extremely reluctant to leave his home.

During the oral argument it was suggested, and consented to by both parties, that the members of this court could, if they so desired, either collectively or individually, talk to the child and learn his wishes and feelings respecting the parties to these proceedings. Accordingly the Chief Justice and the writer of this opinion have had a personal interview with the boy. He is an exceptionally bright child. The result of that interview confirms what is apparent all through the record, the desire of the boy to be left where he is, his strong affection for his grandmother and stepfather, and the considerate treatment which the child has been receiving.

The record discloses that, so far as the father of the child is concerned, his conduct during the life of the boy's mother, both before the divorce and afterwards, and his neglect of the child since the death of its mother, have been such that he is entitled to very little, if any, consideration respecting the future care or custody of the child. The record abundantly, in my judgment, proves that the boy's mother was not only justified in refusing to continue the marital relations with the boy's father, but that his treatment was such that she could not, without being subjected to neglect and cruel

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treatment, do otherwise. The boy was born in 1907. He was therefore two years old when his mother refused to live longer with his father. The testimony abundantly establishes the fact that during the time from the child's birth until his mother left his father the father drank to excess, neglected his family, did not provide the child either with clothing or other necessities of life as he ought to and could have done; that after his wife separated from him until the date of the trial he did not trouble himself to know whether the child was clothed or fed. The most that it is contended he had contributed to the support of his wife or the child, notwithstanding his wife was sick in the fall of 1909, was the sum of thirty-two dollars at that time and sixteen dollars at a later date. If this controversy were between the father and the defendants, no court, in my judgment, would hesitate in dismissing the petition.

It is true, everything else being equal, that the natural parent of a child is entitled to its care, custody, and control. This court, however, by its former decisions, 1 is committed to the more humane doctrine that in cases of this nature the natural parent may, by agreement or by conduct, deprive himself of his natural right and confer it upon others; that in cases where the parent has lost that right either by agreement or conduct the guiding principle will always be the best interests of the child for the present and its future. *Stanford v. Gray*, 42 Utah, 228, 129 Pac. 423, Ann. Cas. 1916A, 989; *Hummel v. Parrish*, 43 Utah, 373, 134 Pac. 898.

Under the facts as appearing in this record it is not easy to determine just what disposition should be made of the child. The fact is that the little boy, to a great extent, is a stranger to Mr. and Mrs. Taylor. True, he has visited their place a few times in years gone by, but as he testified, he does not now know where their present residence is located. Very naturally, by reason of the treatment of his stepfather and his grandmother, a strong affection exists between them. It will be with grief and no little heart burning that the grandmother is parted from him or he from her as well as

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from the stepfather. Nevertheless the future interests of the child must control the actions or order of the court.

The district court after a hearing running over a period of several days, concluded that the interests of the child, both present and future, would be best subserved by granting the claim of the petitioner. The grandmother, in the very nature of things, can live only a few years longer. She is without property for her own support and cannot be of any help in the future education of the child. The defendant Christensen is a young man and in all probability will marry again. Doubtless it is his intention to do everything within his means or power to provide the little boy with a home and to educate him and treat him as though he were his own child. What a change in Mr. Christensen's domestic relations might bring to the boy or the treatment he might receive in his new home are, to say the least, problematical. On the other hand, the record shows that Mrs. Taylor is related to the boy by blood, being a sister of the boy's father. Both Mrs. Taylor and her husband are anxious to adopt the child, and, as they both testified, treat him as their own child. They are able to do much more for him in a material way than either or both of the defendants. If, however, there were no other reasons than material benefit the court would not be justified, for that reason alone, in awarding them the custody of the child. No word of suspicion is found in the entire case against the character of either Taylor or his wife. The lower court evidently did, and so must this court, accept their statements that the little boy will be treated with every consideration and kindness and that every effort will be made by them tending to promote the present happiness and future usefulness of the child, and that his surroundings will be of such a pleasant nature and such kindness and consideration will be shown him as will cause him to become attached to and fond of his adopted parents. Without that assurance the court would not be justified in awarding them the custody of the child.

Moreover, it is in evidence, and in fact it is apparent from the entire record, that the relationship existing be-

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tween the families of Mr. and Mrs. Taylor and that of 2  
Mrs. Jacobsen is most intimate and cordial. As stated  
herein, the elder brother of this minor is now, and has been  
since he was of the age of about three years, making his  
home with Mrs. Jacobsen. It is in every way desirable that  
the two children should know more of each other than they  
do under the present arrangement, or are likely to if this  
little boy continues to make his home with defendants. Con-  
ceding the delicacy of taking the child from his present sur-  
roundings, I am, nevertheless, in considering the future in-  
terests and well-being of this child, clearly of the opinion  
that it will be for his best interests that his future should be  
with the family of his uncle and aunt, and that the district  
court was justified in the decree entered.

The record in this case is voluminous, covering nearly 800  
typewritten pages. Very much testimony was offered by  
both parties respecting the wishes of the mother of the child  
as expressed by her during her last illness. Mrs. Taylor tes-  
tified that the mother at various times appealed to her to  
care for her son Joseph. Likewise Mrs. Jacobsen testified  
that the mother of the child said to her, not only once, but  
repeatedly, that she wished that she (Mrs. Jacobsen) might  
give the boy a home, and if she could not, that Mrs. Taylor  
would. On the other hand, the grandmother, the stepfather,  
and a Mrs. Dahl, a sister of the boy's mother, testified that  
frequently during the mother's sickness she expressed a re-  
quest and desire that the child should continue to remain  
with the stepfather and the grandmother. I have little doubt  
that all these witnesses were testifying truthfully, notwith-  
standing the apparent conflict. The mother seemed to feel  
that her eldest child was and would be provided with a home  
and cared for by Mrs. Jacobsen. Let me pause at this place  
to remark that Mrs. Jacobsen stands out in this record by far  
the worthiest and most unselfish character mentioned. The  
future of the republic will be better anchored if her kind is  
multiplied. The mother's chief anxiety seems to have been,  
during her last sickness, concerning the future of this little  
boy. She knew he had nothing to expect from his father.

She knew that Mrs. Jacobsen, in addition to rearing a family of her own, had cared for her afflicted child practically since his birth and could not, and ought not be required to, take on additional burdens. The mother was racked by pain and was much of the time not herself mentally. Under such circumstances it is not at all surprising that she made these apparently contradictory pleas. All of this testimony may have been of but little help to the court in determining the conflict between the parties respecting the future interests of the child. The district court, however, deemed it of sufficient importance to make a finding that the deceased had on numerous occasions "requested that her son Joseph be taken, cared for, and reared by Mrs. Jacobsen or by Mrs. Taylor." The court could, with equal propriety, have made a finding that she made the same request of the other parties to this proceeding.

The lower court, doubtless by adopting findings prepared by counsel for petitioner, found that the mother of the child, about the month of July, 1909, left the home of the petitioner without his fault and contrary to his wishes, and that the petitioner had, up until the date of their separation, supported and maintained his wife and child to the best of his ability. That finding is wholly immaterial to the question to be determined. In addition to that, in my judgment, it is contrary to not only the findings of the district court in the divorce proceeding, but is against the great weight of the evidence in this action. Moreover, it is an unnecessary and unjust reflection upon a woman who has passed to the great beyond and is not in court to defend herself against any such accusation. It should be annulled and stricken from the findings made by the court.

It also appears in the record, as indicated above, that Mr. Taylor and his wife have filed a petition in the district court of Salt Lake county for the adoption of this little boy, and that the father, petitioner herein, has filed a relinquishment of all his right or claim to the boy and consented to his adoption by Taylor and wife. It is not apparent that any order of adoption was ever made. It also appears that Mr. Chris-



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tensen has filed a petition with a view of adopting the child, but as I understand, both of these proceedings are held in abeyance pending this appeal. It sufficiently appears from what has been said that this court would not favorably consider awarding the custody of the child to the petitioner, except as that may be a medium for his adoption by Taylor and wife.

For the foregoing reasons the case is remanded to the district court of Salt Lake county, with directions to strike from the record the finding relating to the abandonment of the petitioner by his wife as indicated above. Otherwise the judgment is affirmed conditionally that an order of adoption of the child on the part of Mr. Taylor and wife be filed in this proceeding within thirty days after the remittitur from this court has reached the district court. If no such order of adoption is so filed, the district court is directed to set aside its former order and judgment and dismiss the petition. Neither party will recover costs on appeal.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

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DAVIS v. MELLEN et al.

No. 3334. Decided July 11, 1919. (182 Pac. 920.)

1. **INDEPENDENT CONTRACTOR—IMPROVEMENTS OF STREETS—BARRICADES—DUTY OF CONTRACTOR.** A contractor who rightfully enters upon a highway for the purpose of improving a street has a right to barricade and obstruct the public travel over the section of the street being improved. (Page 21.)
2. **SAME—IMPROVEMENT OF STREETS—LIGHTS—DUTY OF CONTRACTOR.** A contractor engaged in improving a city street must place suitable lights in the nighttime on barricades to warn the public of the presence of the barricade, and that the portion of the street closed and barricaded is not open to travel. (Page 21.)
3. **SAME—ACCIDENTS IN STREET—NEGLIGENCE OF CONTRACTOR.** That a contractor engaged in improving a street had agreed in his

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contract with the state road commission to provide "a competent watchman at all times to protect the work from traffic, or damage of any nature until traffic is admitted," did not render him negligent in failing to place a watchman on the work, as far as an automobilist, who ran into a barricade erected to warn the public that the street was closed to travel, was concerned. (Page 21.)

4. SAME—ACCIDENTS ON STREETS—NEGLIGENCE—PROXIMATE CAUSE. Although a contractor improving a city street was negligent in barricading the street and in providing a passageway, he was not liable for damages occasioned an automobilist driving through such passageway in the nighttime, due to the placing of wagons in the passageway by a third person in the nighttime, without the contractor's consent, leaving a passage too narrow for vehicles to pass each other, compelling plaintiff, upon suddenly meeting a speeding automobile in the narrow passage, to turn into the barricade to avoid a collision, the contractor's negligence not being the proximate cause of injury received.<sup>1</sup> (Page 22.)
5. SAME—IMPROVEMENT OF STREETS—NEGLIGENCE. A contractor improving a city street, who left a narrow passage for traffic, was not in duty bound to anticipate that, during the night a third person would leave a loaded wagon in such passage, and cause damage to an automobilist during the night. (Page 22.)

Appeal from District Court, Third District, Salt Lake County; *R. B. Porter*, Judge.

Action by John B. Davis against J. W. Mellen and George H. Sims and others, copartners doing business under firm name and style of Salt Lake Transfer Company. Judgment for plaintiff after dismissal of action against the partnership, and Mellen appeals.

REVERSED.

*Stewart, Stewart & Alexander* of Salt Lake City, for appellants.

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<sup>1</sup> *Callahan v. Salt Lake City*, 41 Utah, 300, 125 Pac. 863; *Dayton v. Free*, 46 Utah, 277, 148 Pac. 408.

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*Dey, Hoppaugh & Fabian* of Salt Lake City, for respondent.

CORFMAN, C. J.

Plaintiff brought this action in the district court of Salt Lake county to recover damages alleged to have been sustained by him through the negligence of the defendants while he was driving his automobile on State street, a public highway leading from the south into Salt Lake City. At the trial plaintiff dismissed his action as to the defendants constituting the partnership Salt Lake Transfer Company, and then proceeded against Mellen alone, whom we shall hereinafter refer to as defendant.

Mellen was a contractor engaged by the State Road Commission hereinafter referred to as the commission, to lay cement pavement for the surfacing of certain portions of State street between Salt Lake City and Murray. He was required, under his contract with the commission, to do the paving in sections. He had finished the pavement at or near the intersection of Twenty-first South street with State street when it was found that a water pipe or conduit crossing State street at that point was of insufficient size, and that it would be necessary to take it up and replace it with a larger one in order to carry the water. He was requested by the commission to make the change after the completion of the pavement as before stated, and was engaged in so doing when the accident occurred of which plaintiff complains. While proceeding to the work of taking up the pipe and replacing it certain barricades were placed by Mellen across State street to warn the public of the excavations made in the street, and to prevent vehicle travel over the green cement used in repairing the pavement where the pipe was being replaced. Twenty-first South street is sixty-six feet wide. State street is one hundred and thirty-two feet in width, and is traversed through or near the center by a double-track street railway line. The pavement had been laid on both sides of the street railway lines. To better illustrate the conditions on State

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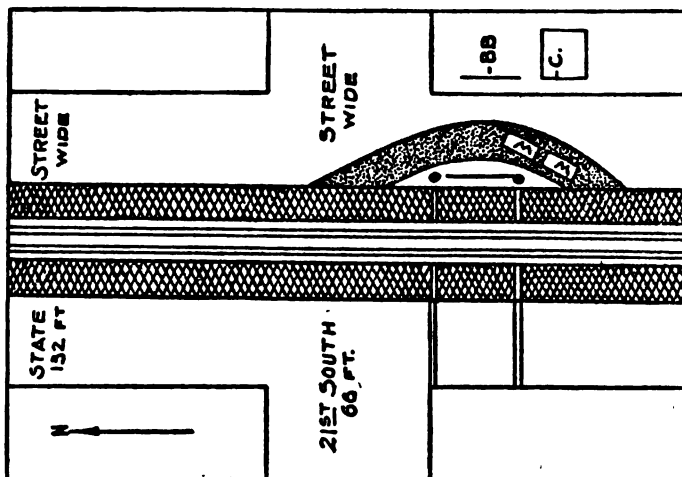
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street at the time and at the place of the accident we have drawn the accompanying sketch or plat. The plat is not drawn to scale, nor is it intended to do more than represent the conditions in a general way.

The two sets of parallel lines represent the street car tracks near the center of State street. The space between tracks is six feet eight and one-half inches wide. The heavily shaded spaces indicate paved portion of street, sixteen feet in width on either side within two feet of street car line. The lines extending at right angles with the paved portions of the street represent wooden barriers approximately three and one-half feet in height, entirely closing State street to the west of car tracks, and partially to the east, for a distance north and south between barriers. The two small circles represent telephone poles. Attached to the ends of the wooden barricades, and passing around and nailed to the poles, as indicated by irregular line, was a wire mesh forty-two inches high, containing twelve longitudinal wires with numerous cross-wires. The light dotted space indicates the passageway or detour around the barricaded section of the street taken by vehicles in leaving and returning to the pavement, covering a distance of about eighty feet. The two parallelograms marked "w" indicate two wagons attached together and heavily loaded with flat steel, standing within the traveled detour. Both were platform wagons. The north wagon had an elevated seat. The effect of the barricades was to direct all travel from the west side to the east side of the street, and to pass vehicles over and through the open passageway or detour about thirty-one feet in width. The heavy line marked "BB," to the east of property line, represents a bill board, while the parallelogram "C" represents a cottage. There were telephone poles along the east side of State street not shown on the plat.

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In preparing the foregoing plat we were unfortunately deprived of the benefit of the exhibits used at the trial of the case, which should have accompanied, but are missing from the files and record on appeal. It is not claimed to be a detailed representation of all the conditions surrounding the accident and it may not be in all respects accurate. However, we think it fairly illustrates the conditions and reflects the testimony of witnesses who saw them at or about the date of the accident.

It is alleged in the complaint in substance:

That the work was being done by the defendant J. W. Mellen under the authority, direction, and supervision of the State Road Commission of the State of Utah; that reasonable care and prudence was required of the defendant J. W. Mellen in doing said work, and the said commission exacted from him in the performance thereof that he should erect good and sufficient guards,

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barricades, and signals and so perform the work as not to close the entire road, but should provide an open unobstructed passageway sufficient to accommodate and provide for the traffic and travel thereon in both directions, all of which the defendant Mellen failed to do; "that the only means provided by the defendant J. W. Mellen or otherwise, for the passage of vehicles traveling in both directions where the said State road was closed and barricaded as aforesaid was a passageway from said Twenty-First South street, extending south a distance of about one hundred feet in length, where it re-entered said State road; that said passageway was over premises immediately adjoining and adjacent to said State road on the east, and immediately east of the line of telephone poles aforesaid; that said passageway so provided was rough and uneven, and only of sufficient width for two vehicles to meet and pass thereon by the exercise of great care and caution; that to the east of said passageway, extending in close proximity to Twenty-First South street, there was a long and high billboard which prevented persons traveling north on State road, prior to and when entering into said passageway, from seeing vehicles traveling west on Twenty-First South street intending to turn south on said State road until such vehicles turned into and had entered upon said passageway, and likewise prevented persons traveling west on Twenty-First South street intending to turn and go south on said State road from seeing approaching vehicles traveling north on State street until said passageway was entered; that during the evening of the twelfth of June, 1917, and about the hour of nine o'clock, as plaintiff is informed and believes the defendant Salt Lake Transfer Company wrongfully and negligently left two large transfer wagons attached together, and loaded with steel and machinery, to stand in and occupy, unattended, unguarded, and unlighted, a portion of the east side of said passageway for a distance of about fifty feet in length; that said wagons so situated left the width of the remaining part of said passageway, which was between said wagons and said line of telephone poles, a distance of less than eleven feet in width, totally insufficient for vehicles to meet and pass; that said passageway of approximately eleven feet in width was the only passageway for vehicles in both directions; that said defendants, and each of them, voluntarily and unlawfully permitted said wagons to obstruct said passageway for at least twelve hours, as plaintiff is informed and believes, notwithstanding the heavy and congested traffic over and upon said State road; that about three o'clock in the morning of June 13, 1917, while the plaintiff was returning home from Ophir, Utah, and driving his automobile north upon the said State road, with due care and caution, when he approached said portion of said State road

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barricaded as aforesaid he turned into said passageway so provided as aforesaid, leading to Twenty-first South street; that at the time there was no approaching vehicle of any kind in sight; that while passing along the west side of said wagons standing as aforesaid an automobile, traveling west on Twenty-First South street, which had been obstructed from plaintiff's view by said billboards and wagons, suddenly turned into said passageway from the north; that a head-on collision was imminent, and, to prevent such collision and its consequences, plaintiff instantly accelerated the speed of his machine, and turned quickly into said State road, thereby avoiding a collision with said approaching automobile in said obstructed passageway; that in so doing plaintiff's automobile encountered and ran into a wire fence forming part of the barricade upon the State road, which said fence the plaintiff was unable to see or discover owing to the absence of any light or other signal upon the same; that thereupon plaintiff's automobile was upturned, and the plaintiff and Mr. Kahn, who was traveling with him, were violently thrown and caught under said upturned automobile; that at the time of said accident said wagons had been wrongfully and negligently by the said defendants, and each of them, permitted to stand, remain, and obstruct the said passageway and view for about six hours, as plaintiff is informed and believes, without any watchman or signal or warning or any other precaution whatsoever being taken to guard or protect travelers or traffic along said passageway; that said accident occurred without any fault on the part of the plaintiff or said Kahn; that it was caused wholly and solely by reason of the carelessness and negligence of the said defendants and each of them in permitting said wagons to obstruct and blockade said passageway and remain for an unreasonable time; also in not providing a watchman or watchmen to warn approaching travelers from both directions of the conditions and danger aforesaid; and in failing to have danger lights and other signals to warn approaching travelers that said road was barricaded and that said passageway was obstructed and of the unusual and extraordinary conditions and dangers aforesaid, which the said defendants and each of them knew, or by the exercise of reasonable care and prudence ought to have known, in time to have averted and prevented said accident; also in failing to provide and maintain a safe detour or passageway for vehicles around the place where State road was barricaded; also by reason of the negligent, careless, and wrongful conduct of the said defendant J. W. Mellen in entirely closing said street to traffic."

The answer of the defendant J. W. Mellen admits the do-

ing of the work under contract and by the direction of the State Road Commission, but denies that the work was being done in a negligent manner, or that he failed to maintain suitable barricades, notices, and warnings on the portion of the street being repaired, or that he left an unsafe passageway for travel; and affirmatively alleges that the accident to plaintiff was caused by his own negligence in fast driving, failure to observe the crossway, the lights, signs, and warnings placed there by defendant, failure to take heed of the approaching automobile, and negligence, without his knowledge, of the Transfer Company in leaving its wagons standing in and obstructing the passageway afforded for public travel.

Upon trial of the issues the jury found a verdict in plaintiff's favor, and a judgment was entered against the defendant.

On appeal the defendant assigns many errors, so many that it is impractical to set them all forth and discuss them here in detail. Summarizing, the defendant complains of the rulings of the trial court in denying defendant's motion for a nonsuit at the conclusion of plaintiff's testimony, the refusal to instruct and direct a verdict in favor of defendant, permitting plaintiff's counsel in addressing the jury to argue immaterial and incompetent testimony over defendant's objection, and that the verdict and judgment are not sustained by the evidence and are contrary to law.

There is not a great deal of conflict in the testimony. The physical conditions at and near the place of the accident, as testified to by the witnesses, were in a general way the same as alleged in the complaint and as admitted by the answer. Plaintiff introduced testimony to show that there were no lights on the barricades. Defendant's witnesses testified that lights were placed on the barricades to warn travelers at night, and that lanterns were seen there the morning following the accident, one of them still burning. There was also some conflict in the testimony as to how extended a view could be had of Twenty-first South street, and also of State street, while approaching the barricaded section from the south.



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Robert B. Mark, a witness for the plaintiff, who had viewed the scene of the accident the same morning, made the following observations concerning road conditions:

"June 13, 1917, I made an examination at about 9:15 A. M. concerning physical conditions near the intersection of Twenty-First South and State street. State street, on the south side of its intersection with Twenty-First South street, was partly barricaded with barricades about three and one-half feet high. The barricade on the east side of the street extended to the first telegraph pole. There was another telegraph pole in the street on the east of the southeast telegraph pole. Between the two poles was thirty-one feet. \* \* \* At a point eighty feet south of the intersection of Twenty-First South and State traffic had been diverted in a northwesterly direction. In this space, through which traffic was being directed, there had been left two vans of the Salt Lake Transfer Company. The van farther south was loaded with flat steel. The steel extended beyond the bed of the wagon to the south probably five or six feet. The wagon or pole of that wagon, was extended underneath the wagon ahead of it, and the wagon ahead of it was loaded partly with flat steel and partly with some pieces of machinery. \* \* \* Extending on northerly from the north wagon were two poles to accommodate a three-horse team. The length over all, from the north point of the north wagon—that is, the wagon bed—to the south point of the projecting load of the second wagon was forty feet eight inches. Each wagon was approximately six feet across. The available traveling space between these wagons and the barricade was nine feet ten inches. \* \* \* A wire mesh ran between the north telegraph pole and the south telegraph pole, and thence near the east side of the railroad track, marking the boundary lines of the barricade on the east side of State street. The distance from the north telegraph pole to the south telegraph pole is thirty-eight feet four inches. The distance from the south telegraph pole to the south edge of the load on the south wagon of the Transfer Company is forty-one feet. The distance from the southeast pole to the barricade to the property line on the east is about thirty-five feet, so that there was left thirty-five feet of the street east of the barricade. \* \* \* I noticed that the street had been traveled by wagons east of where the Salt Lake Transfer wagons were located, the width of another team or another wagon, which showed that the passageway extended east eight or ten feet, and that this had been used as a part of the passageway. I am speaking of the south wagon. The south wagon was nineteen feet eleven inches east from the east rail. The south end of the south wagon bed was about two feet five inches east of the east

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line of the pavement. The steel projected about five feet over the hind end of the south wagon and about a foot and a half or two feet over onto the pavement. \* \* \* I found that the wire barricade running from the south pole to the railroad track was not intact. All the wires were broken into from the machine coming in contact with and pulling the wire. \* \* \* The wires on the east side of the barricade running between the two telephone poles was still intact."

The plaintiff testified concerning the accident:

"The accident occurred about 2:30 A. M., June 13, 1917, while I was driving my car north on State street. Mr. Kahn, another traveling salesman, was with me. We were coming from Grantsville, Tooele county. I was traveling about twenty miles an hour when I was going around the end of the wagon, the large truck standing on the east side of State street. When I got around the end of the wagon and within a short distance from the telegraph pole another machine drove in from Twenty-First South street. I saw I was going to have a head-on collision, and I turned my car quickly, and used my accelerator, and gave her more gas, and turned back into State street, and I thought it was about the only course I could take at the time to save me having a head-on collision. As I made my turn I got in contact with the wire. I was watching the road as I came up State street. I observed Twenty-First South street at the only point that it could be observed; that would be back and east of the billboards there. That is the only place that I could observe Twenty-first South street with these wagons there where they were. The lights on the car coming towards me were dim. They had their dimmers on. I was about four feet in the cutoff or passageway from the south pole when I observed this car approaching. \* \* \* There were no lanterns or other lights on the wire or wagons. I did not see or hear a watchman. The next thing I heard was the lights break, the glass in my lap, and I knew I was up against a wire fence. I saw the fence at the time. I went down over that little embankment south of the pole, and the car jarred and swerved. I do not remember very much more until I found myself under the car. \* \* \* I was perfectly familiar with Twenty-First South at the time of the accident, and knew the billboards were in that locality. Every man that rides up and down State street and looks to the right or to the left of him with a view of seeing whether any one is coming down at that intersection northeasterly sees those signboards. In approaching a street light at Twenty-First South, in order for a man to have any degree of security or safety it is necessary for him to look both to the right and to the left of him and in front of him to see who is approach-

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ing from that point. That is true. Twenty-First South is a very much used street, and that intersection with State is a very busy intersection. I knew that this night. I knew there was an obstruction there Monday morning, and I thought there was an obstruction there the night of the accident. I presumed there was, and I was watching for it until I saw those wagons, then I made my turn. \* \* \* Q. Now you state here in your complaint that the reason why there wasn't enough room through that passageway for two vehicles to pass, or two machines to pass, was because of the two wagons that were left there by the Salt Lake Transfer Company. Is that true? A. Yes, sir. Q. Was there ample room for two vehicles to pass each other there if these two wagons had been out of the way? A. Yes, sir. Q. If these two wagons hadn't been there when you saw this machine coming, if you did see one coming, you would have had ample room to have turned to the right, and the automobile coming towards you would have ample room to have passed you. That is true, isn't it? A. Yes, sir."

The contract between the State Road Commission and the defendant for the improvement of State street, among other things, provided:

"All the work shall be done in sections consisting of the space between the property line and the center of the street, so that the street at no time shall be entirely closed to traffic. No deviation from this rule will be allowed, except upon written permission from the engineer. \* \* \* The contractor shall erect and maintain good and sufficient guards, barricades, and signals at all unsafe places at or near the work, and shall in all cases maintain a safe passageway at all road crossings, crosswalks, and street intersections, and shall do all other things necessary to prevent accident or loss of any kind. The contractor shall provide necessary lights, barricades, fences, etc., and a competent watchman at all times, to protect the work from traffic or damages of any nature until traffic is admitted."

The testimony shows beyond any dispute that while the improvement was being made by defendant under direction and supervision of the State Road Commission the defendant had no authority to direct or control the traffic of the street, except incidentally to the work of making the improvement, by barricading the section where the work was being performed by him under the contract. The undisputed testimony also is that the defendant had no knowledge of the act of the Salt Lake Transfer Company leaving its wagons standing in the

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passageway (which wagons were placed there in the nighttime and in defendant's absence) left open by the defendant in the street for public travel around the closer and barricaded section.

In the presentation of the case to this court counsel have devoted in their briefs, needlessly we think, much space in citing cases and in the discussion of the rights and liabilities of the defendant under his contract with the State Road Commission. As we view the case, and more especially in the light of the decisions of this court in *Callahan v. Salt Lake City*, 41 Utah, 300, 125 Pac. 863, and *Dayton v. Free*, 46 Utah, 277, 148 Pac. 408, and the authorities there cited, the defendant was an independent contractor, and the only questions to be determined here are, was the defendant negligent, and, if so, was his negligence the proximate cause of the injury of which the plaintiff complains? Having these questions in mind, we have quoted more extensively from both the pleadings and testimony than we otherwise would, in order that the assignments of error may be considered as a whole and as bearing on this one important matter for our determination. The contract between the State Road Commission and the defendant, in so far as the issues between the plaintiff and the defendant are involved, is of but little consequence, except for the purpose of showing that the defendant rightfully entered upon the highway for the purpose of improving the street. The right to barricade and obstruct the public travel over the section of the street being improved, upon principle and authority, was a paramount right. *Phelan v. Granite Bituminous Paving Co.*, 227 Mo. 666, 127 S. W. 318, 137 Am. St. Rep. 603; 13 R. C. L. title "Highway," section 88. We find nothing in the record tending to show that the closed section of State street was not properly barricaded. That it was the duty of the defendant to place suitable lights in the nighttime on the barricades to warn the public of its presence, and that the portion of the street closed and barricaded was not open to travel, must be conceded, regardless of his contract with the State Road Commission that he must do so. The contract further provided that

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the defendant should provide "a competent watchman at all times to *protect the work* from traffic or damages of any nature until traffic is admitted." (Italics ours.) The testimony is in conflict as to whether or not lights were on the barricade on the night of the accident in question. That there was no watchman present is an admitted fact. We find no testimony in the record tending to show that it was necessary, usual, or customary to have a watchman there for safeguarding the public or for any purpose other than "to protect the work" as is provided in the contract. His failure to do that was a matter, as we view it, wholly between himself and his employer, the State Road Commission, and not one of which the plaintiff in this action may complain.

Again, referring to the contract, some contention is made by respondent that under the contract defendant was not authorized to barricade the street to the extent it 1-3 was closed to public travel. In other words, that after barricading the west side the entire east side should have been left open for travel. We do not so construe the contract. It simply provides, "The street at no time shall be entirely closed to traffic." That a portion of the street was left open for travel by the passageway, over which hundreds of automobiles and other vehicles were daily passing, the testimony shows to be an absolute certainty.

But conceding that the defendant was negligent in all the particulars complained of, the question still remains, was the defendant's negligence the proximate cause of the injuries? We think not. The plaintiff's own testimony conclusively establishes that immediately before the accident, when he was in the passageway, he appreciated and knew of the closed section of the street. He had driven his automobile over State street but a day or two before and had passed through the passageway. He remembered it, and, as he was approaching the closed or barricaded section, he followed the traveled track of vehicles fully conscious of the fact that he was entering it. Unobstructed, there was ample room for his automobile to pass in safety any approaching vehicle from the north or opposite direction. Left standing unattended in

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the passageway, without lights or other signals of warning upon them, were the two wagons of the Salt Lake Transfer Company, closing it so that vehicles moving 4, 5 in opposite directions could not pass. As plaintiff entered the passageway where the wagons stood he saw an automobile with an unknown driver dashing through the passageway at a speed of not less than thirty miles an hour. Plaintiff was driving twenty miles an hour. A head-on collision was imminent, to avoid which he quickly turned his machine into the wire of the barricade and was injured. Had the wagons not been left standing in the passageway plaintiff would have passed through in perfect safety. Had the approaching driver not been driving his machine at so reckless a speed no danger would have confronted plaintiff, and he would have had time to pass without accident. The plaintiff so testified. The closing of the passageway by the wagons so that two vehicles could not pass, and leaving them there without signals and unattended through the night, and the reckless speed with which the automobile was driven through it by the unknown driver, were the two contributing and the proximate causes of the plaintiff's injuries, of neither of which did the defendant have any knowledge, nor was he, under the circumstances, in duty bound to anticipate.

Admitting that the barricades were insufficient about the closed section of the street, that they were left without lights or proper signals of warning, yet the fact remains beyond any dispute, had it not been for the wrongful acts of others in leaving the wagons standing in the detour or passageway, and the reckless manner in which the automobile driven from the north approached the plaintiff, which, as we have pointed out, were the sole proximate causes of the accident, the plaintiff would have passed by the closed section of the street without harm, regardless of any act of omission or commission charged against the defendant.

We think the trial court erred in not granting the defendant a nonsuit, in refusing to direct a verdict in defendant's favor, and in denying him a new trial. The findings of the jury in plaintiff's favor were not supported by the evidence,

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and therefore the judgment entered against the defendant was contrary to law and should be reversed. It is so ordered. Defendant to recover costs.

FRICK, WEBER, GIDEON, and THURMAN, JJ.,  
concur.

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In re HANSEN'S ESTATE.

No. 3319. Decided July 31, 1919. (184 Pac. 197.)

1. EXECUTORS AND ADMINISTRATORS—EVIDENCE INSUFFICIENT TO SHOW DECEASED WIFE OWNED STOCK AND SECURITIES. Evidence *held* insufficient to show that a deceased wife was the owner of canal stock, or a note and mortgage, transferred by her husband, her administrator, by indorsement in his handwriting. (Page 34.)
2. HOMESTEAD—RIGHT OF SURVIVING SPOUSE TO OCCUPY NOT LOST BY REMARRIAGE. On death of the husband or wife, the surviving spouse, under Comp. Laws 1917, section 7643, is vested with the right of occupancy and use of the homestead, which continues until otherwise directed by the court, and is not lost merely by remarriage. (Page 36.)
3. ATTORNEY AND CLIENT—COUNSEL'S ADMISSION OF CONCLUSION OF LAW NOT BINDING ON CLIENT OR COURT. Counsel's admission of a legal conclusion is binding neither on his client nor on the court; it being the court's duty to declare the law as it exists, regardless of concessions. (Page 37.)
4. EXECUTORS AND ADMINISTRATORS—PAYMENT OF CLAIMS WITHOUT PRESENTATION NECESSITIES PROOF THAT THEY WERE JUST. An administrator is entitled to credit for debts paid by him in good faith, on making satisfactory proof that they were justly due and that the amount paid was the true amount of the debt over all payments or set-offs, and that the estate is solvent, though no claim for such indebtedness was presented and allowed as provided by the Probate Code. (Page 38.)
5. EXECUTORS AND ADMINISTRATORS—PAYMENT OF CLAIMS WITHOUT ALLOWANCE PLACES BURDEN OF PROOF ON ADMINISTRATOR. In paying claims without requiring their presentation and allowance, the administrator acts at his peril, and assumes the burden to prove all the facts required by Comp. Laws 1917, section 7750, to be proven to the satisfaction of the court. (Page 38.)
6. EXECUTORS AND ADMINISTRATORS—PAYMENT OF TAXES GIVES

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RIGHT TO CREDIT. A widower, administrator of his deceased wife's estate, interested in preserving it for himself and their children, acted within his rights in paying taxes out of his own funds, and is entitled to credit therefor, with interest, on his final accounting, whether paid before or after his appointment. (Page 39.)

7. EXECUTORS AND ADMINISTRATORS—IMPROVEMENTS ON REALTY SHOULD BE AUTHORIZED BY COURT. An executor or administrator should apply to the court for authority to make improvements on realty of decedent, and if he chooses to make them without first obtaining authority he assumes the burden clearly to prove the improvements were necessary and made in good faith. (Page 41.)
8. EXECUTORS AND ADMINISTRATORS—WHAT REPAIRS AND IMPROVEMENTS GIVE RIGHT TO CREDIT. Under Comp. Laws 1917, sections 7718, 7739, a widower, administrator of his deceased wife's estate, *held* entitled to allowance on final accounting of any expenditures necessarily made in repairing houses, buildings, or fences existing at the death of his wife, though whether he should be allowed credit for new additions to the house, the erection of a barn, etc., was for the district court to determine, in view of the condition of the premises, etc. (Page 41.)
9. EXECUTORS AND ADMINISTRATORS—WINDMILL NOT IMPROVEMENT ENTITLING ADMINISTRATOR TO CREDIT. A widower, administrator of his deceased wife's estate, on his final accounting as such, *held* not entitled to credit for the cost of erection of a windmill, an improvement of a temporary character, necessitated mainly for his own convenience while occupying the premises. (Page 43.)
10. HUSBAND AND WIFE—LOAN TO HUSBAND SECURED BY NOTE SIGNED BY WIFE AS SURETY, NOT A CHARGE ON HER ESTATE. Where a husband borrowed money for his own use, and his wife signed the notes merely as surety, the husband, after his wife's death, when he was her administrator, in paying the notes merely paid his own debt, and cannot charge any portion thereof to the estate. (Page 43.)

Appeal from District Court, Salt Lake County, Third District; *H. M. Stephens*, Judge.

In the matter of the estate of Maren C. Hansen, deceased. Petition by Martha H. Reese, decedent's daughter, against Henry Hansen, her father, the administrator, to compel an



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accounting, and for his removal and the appointment of a successor. From a judgment for petitioner, the administrator appeals.

REVERSED, and cause remanded with directions.

*H. Ray Van Cott* of Salt Lake City, for appellant.

*A. V. Watkins* of Salt Lake City, for respondent.

AGEE, District Judge.

The deceased died intestate November 4, 1895, in Salt Lake county, possessed of forty-three acres of land in that county. No proceedings were had for the administration of her estate until March 14, 1902, when the appellant, Henry Hansen, was appointed administrator of said estate and qualified as such. On March 24, 1902, an inventory and appraisal of the estate was filed, which showed that the estate consisted of two tracts of land, one of twenty acres, appraised at \$660, and the other of twenty-three acres, appraised at \$940. These tracts were separated merely by a public road, and constituted the home of the appellant and his family. Nothing further was done until the 26th day of October, 1915, when an order was entered directing that notice to creditors should be published, which was accordingly done, and on December 28, 1915, a decree finding that due notice had been given to creditors was entered, but no claims against the estate were presented.

The deceased left, surviving her, her husband, the appellant herein, and five minor children, of whom Martha H. Reese was the eldest. The appellant and his family had lived on this land for several years prior to the death of his wife, and after her death he and their five minor children continued to reside there until the children reached their majority, respectively, or married and left the parental domicile. About a year after the death of Maren C. Hansen, appellant remarried, and he and his present wife and their children

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In re Hansen's Estate, 55 Utah 23.

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have continued to occupy the said premises as their home. On January 11, 1917, the respondent, Martha H. Reese, filed in the district court of Salt Lake county a petition, alleging that she was a daughter and heir of said deceased, the appointment of the appellant as administrator of the estate of her deceased mother, Maren C. Hansen, and that her mother left an estate consisting of two tracts of land hereinbefore mentioned, of the value of \$660 and \$940, respectively, and also of certain shares of capital stock in an irrigation company, which shares of stock she alleges were held in trust by the appellant as trustee for his former wife, for the purpose of irrigating the lands described.

After setting out the names of the heirs of the deceased, respondent further alleges that appellant, as administrator of the estate of her deceased mother, had failed and neglected, for a period of more than fourteen years after his appointment and qualification as such, to publish notice to creditors; that he had occupied said real estate for more than fourteen years after his appointment as administrator and had enjoyed the property as his own, and had also used the irrigation stock as his own, and had neglected to account to said estate for the rents and profits thereof for that period of time; that he had failed to take the necessary steps to have the estate closed and distributed, and had allowed the real estate to be sold for taxes for the year 1900, and had procured a quitclaim deed therefor in 1914 from Salt Lake county, conveying said real estate to him personally, and not as administrator. She further alleges that appellant pretended to have large claims against the estate, which were not legal and just, and that he claims to be the owner of the stock in the irrigation company, and denies that he held the same in trust, and that it would be necessary to bring suit to recover said stock and the said water rights and the rents and profits of said real estate for the time that he had occupied the same. She prayed that appellant, as such administrator, be required to render an accounting and for the revocation of his letters of administration, and the appointment of another as administrator, and for general relief.

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To this petition the appellant filed an answer in which he admits the allegations of the petition as to the death of the deceased, his appointment as administrator; that the deceased left an estate, consisting of the real estate described in the petition; that it was of the value therein stated; and that he did not publish notice to creditors until more than fourteen years after his appointment, and had not rendered any account or taken any steps to close the estate. He denies, however, that the deceased was the owner of any water stock or water right, or any personal property, at the time of her death, and alleges in substance that the reason that he did not render an account as such administrator, or publish notice to creditors, was that in March, 1894, he was sick and was not expected to live any great length of time, and that at that time he was the owner of all of the said real estate, and that the improvements thereon were of little value, and that in order to protect his wife, and to provide for her and their children, all of them minors, in case of his death, he conveyed the real estate to his wife without other consideration; that thereafter he regained his health, and that his wife died November 4, 1895; that his wife intended, and repeatedly promised to reconvey the real estate to him, but that for about two months before her death she was physically unable to make the necessary conveyance. He further alleges that after the death of his wife he purchased the interest of all of his children in said property, and that all of them except the respondent, Martha H. Reese, conveyed their interest to him, and that the said Martha H. Reese had received the consideration agreed upon, and had agreed to convey her interest in said real estate to him, but afterwards refused to do so. He admits that he occupied the premises for more than fourteen years after his appointment as administrator, but alleges that the rental value of said real estate in the condition it was in at the time of the death of Maren C. Hansen, and at all times since that date, exclusive of the improvements placed thereon by him, and without water right, did not exceed fifty dollars per year, and further alleges that ever since the death of his wife he had paid the taxes on said real estate, and that he

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had at all times resided on said lands with his minor children. He admits that he made claims against the estate, but denies that said claims are illegal or unjust.

With his answer appellant filed an account as follows:

"Account and Report.

Debtor.

To amount of inventory and appraisement of property of said estate, on file herein.....	\$1,600 00
Rental value of real estate, without water right, in the condition that the property was in at the time of the death of Maren C. Hansen, deceased, commencing in the year 1902 and ending with the year 1916, at \$50 per annum .....	700 00
<b>Total.....</b>	<b>\$2,300 00</b>

Contra.

To clerk's fees:

Filing petition.....	\$2 00
Filing inventory .....	\$10 00 \$ 12 00
To advertising notice to creditors.....	4 00
To advertising notice of hearing on petition.....	5 00
To medical services, hired help, and nurse charges for deceased .....	520 00
To payment of two promissory notes: One to Charles Nielson, of Big Cottonwood, Salt Lake county, Utah, for \$500, and the other to Joseph P. Newman of Big Cottonwood, Salt Lake county, Utah, for \$500, owed jointly by Maren C. Hansen and Henry Hansen at the time of the death of Maren C. Hansen, one-half of which is chargeable against the estate of Maren C. Hansen .....	500 00
Attorney's fees, paid to Smith & McBroom.....	50 00
Attorney's fees paid to Wilson & Smith.....	25 00
To taxes on real estate for the years 1902 to 1916, both inclusive .....	578 45
To C. A. Carlquist, funeral expenses, November 4, 1895....	78 00
To Utah Nursery Company, for trees planted on said property .....	9 00
To Victor Anderson, for driving well on said real estate, October, 1897 .....	250 00
Paid Consolidated Wagon & Machine Company for wind-mill .....	62 50
To A. N. Anderson for furnishing material and driving flowing well .....	358 00

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To improvements made on real estate by Henry Hansen, since the date of the death of said deceased, which were and are of the value of.....	1,425 00
(The last-mentioned improvements consist of the construction of four rooms, rebuilding of a summer kitchen, and the construction of a barn and a granary.)	
To building a fence on said real estate by Henry Hansen	206 00
(Henry Hansen has constructed a flowing well to which is attached a windmill, but such flowing well and windmill are before accounted for in this report.).....	
Total.....	\$4,077.95

The respondent, in a reply filed, alleges, inter alia, that the real estate in question was purchased with money belonging to her deceased mother, and that the appellant took title thereto in his own name, and that because of difficulties in which appellant became involved he conveyed the property to his wife. With her reply the respondent filed exceptions to the account rendered by appellant, in which she objected generally to all of the items therein, on the ground that none of them were presented within the time limited by the notice to creditors, and were not properly chargeable against the estate. She particularly objected to the items of \$500 paid to Newman and Nielsen; the items for medical services, hired help, and nurse, and all of the items of expenditures for improvements on the land, on the ground that they were not properly chargeable against the estate and are exorbitant. She also excepts to the items for attorney's fees, on the ground that the attorneys had been negligent in looking after the legal business of the estate, to the damage and detriment of the estate, and that the services were of no value to the estate. She also excepts to the item for medical services, hired help, and nurse on the ground that the charges were exorbitant, unsupported by vouchers, and indefinite as to time, amount, and class of service, and by whom rendered. She also excepts to the amount with which appellant charged himself as rent for the real estate and alleges that the rental value was at least \$500 per annum.

We have stated the issues joined thus fully in order that a full understanding of the questions involved may be had.

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By agreement the issues joined by the petition, the answer, and reply, and the account rendered by the administrator, appellant herein, and the exceptions thereto by the respondent were tried together. The hearing was commenced on December 3, 1917, and on the next day a postponement was ordered by agreement, and the trial was resumed March 28, 1918. In the meantime Messrs. *Smith & McBroom*, who had previously represented him, had withdrawn as counsel for appellant, and *Ray Van Cott, Esq.*, and *Hon. A. J. Weber*, now a member of this court, appeared for the appellant during the remainder of the trial. At the conclusion of the trial the court refused to allow any of the items of appellant's account, except two dollars for filing of petition for letters of administration, ten dollars for filing inventory, four dollars for publication of notice to creditors, and five dollars for publishing notice of hearing on petition, a total of twenty-one dollars, and found that at the time of her death the deceased, Maren C. Hansen, was the owner of the real estate hereinbefore mentioned, and also twenty-four shares of the capital stock of the Utah & Salt Lake Canal Company, and a note for \$900, made by one Bostolo Brosghien, payable originally to the appellant, Henry C. Hansen, and secured by a mortgage on certain real estate, and assigned to the deceased, and that such shares of stock and said note and mortgage should have been included in the inventory filed by appellant as administrator. The trial court also found that appellant was chargeable with rental value of the real estate from January, 1896, a little less than two months after the death of Maren C. Hansen, to the date of the judgment, together with legal interest thereon, amounting in the aggregate to \$17,396.84. The court further found that there was due from the administrator, because of said note and mortgage, \$2,892.25, and that the appellant had received for a right of way for a railroad line over the real estate the sum of \$174, which, with interest, amounted to \$234.35, making a total debit against appellant of \$20,523.44.

Judgment was entered in accordance with these findings, and removing appellant as administrator, appointing another

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administrator, and directing such administrator to bring necessary legal actions to recover from appellant and other necessary parties the rents and profits owing by him to the estate, and also to recover the twenty-four shares of capital stock in said canal company. From this judgment the administrator has appealed to this court, and assigns many errors, but the only errors which we deem it necessary to consider are those challenging the correctness of the judgment of the trial court in charging the appellant as administrator with rents for the real estate from the date of the death of Maren C. Hansen to the date of the accounting, and with the \$900 note and interest thereon, and with the twenty-four shares of canal stock, and refusing to allow him any credits for the payment of any debts of the deceased, expenses of her last illness, funeral expenses, and attorney's fees, or for taxes paid, or for improvements and repairs made on the real estate, and removing him as administrator.

Much of the evidence in the record relates to the conveyances made by children of appellant after they arrived at their majority, and the consideration therefor; but, since the appellant concedes that at the time of the death of Maren C. Hansen the title to the land in question was in her, we think this has no bearing on the questions involved in this proceeding, the object of which is to require an accounting by the appellant as administrator, and to remove him and secure the appointment of another in his place.

As the respondent contends, and the trial court held, that the twenty-four shares of stock in the canal company and the \$900 note and mortgage belonged to the deceased at the time of her death, and should have been included in the inventory, which contention is stoutly contested by appellant, and he assigns as error this holding of the trial court, we deem it advisable to first dispose of this question. While it is contended by respondent that the land was paid for, at least in part, by money belonging to deceased, it is not contended that appellant was not the original owner of the canal stock and the note and mortgage in question.

The record shows without controversy that on March 3,

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1894, the land was conveyed by appellant to his wife, and there is no evidence in the record, and no attempt to prove, that any consideration whatever was paid by the deceased for this conveyance. The only evidence as to the purchase of the real estate was given by the appellant, who testified that the land was bought with the \$1,000 borrowed from Newman and Nielson on notes signed by him and his deceased wife. He testified, however, that the deceased inherited certain moneys from her father, part of which she received before leaving Denmark, and part after arriving in this country, and that part of this money was spent on this land. At the time the conveyance of the land was executed, appellant assigned to his wife the mortgage in question and presumably transferred the note to her, although all the evidence in the record on this subject consists of the record of the assignment of the mortgage. On the same date four certificates of capital stock of the canal company, aggregating twenty-four shares, held by appellant, were surrendered, and a new certificate for twenty-four shares was issued to Maren C. Hansen. There was no attempt to prove that she paid any consideration whatever for the note and mortgage, or the canal stock. So far as the record discloses, this conveyance of the land and the assignment and transfer of the note and mortgage and canal stock covered practically all the property owned by appellant. The only explanation given for this conveyance of the real estate, the assignment of the mortgage, and the transfer of the capital stock is found in the testimony of appellant and this is very meager. He testified that at the time the deed to the land was executed he was very sick; in fact, so sick that on his recovery he did not remember having made the deed until reminded of the fact by the physician who treated him. He further testified that he had no recollection of having transferred the canal stock, or concerning the \$900 note and mortgage, but that, if he did transfer the canal stock, it was retransferred to him before his wife died. He also testified that after his recovery his wife fully intended to reconvey the land to him, and repeatedly promised to do so, but that for two months before her death she was unable to make the



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necessary conveyance. On October 12, 1897, the certificate of stock issued to Maren C. Hansen was surrendered and a new certificate issued to appellant. The surrendered certificate bore the following indorsement: "Maren Kriestine Hansen, September 25, 1895." The contention of the respondent is that this indorsement was forged by appellant, and, while the appellant denies that he wrote the indorsement, there is evidence tending to show that the handwriting is his.

Conceding this to be true, does it justify a finding that the indorsement is a forgery? We think not. Keeping in mind that it is undisputed that appellant, prior to March 3, 1894, was the owner of the real estate, and of this canal stock, and of the note and mortgage in question, all of which were conveyed and transferred to his wife, Maren C. Hansen, at the same time when appellant was very sick, that it constituted practically all of the property of the appellant, and that all of their children, five in number, were small, we think the most reasonable inference to be drawn is that this conveyance, and this transfer from appellant to his wife were made in contemplation of impending dissolution, in order that in case of his death the widow would not only have the home, but all of the property, to enable her to keep her children together and to rear them, and that upon the recovery of the husband, and when the wife in turn fell sick, it was her desire that in case of her death the husband should have all the property for a like purpose, and that, although she never reconveyed the real estate, she delivered the certificate of canal stock that had been issued to her, and also the note and mortgage, to her husband, if, indeed, the same had ever been in her actual possession, and that she indorsed the certificate and note, or authorized her husband to indorse her name thereon. In other words we think the only reasonable inference to be drawn from all the facts and circumstances appearing in the record is that it was the desire of appellant and his wife, Maren C. Hansen, that upon the death of either the survivor should at once, without any probate proceedings, have all the property which they had accumulated through years of toil, to enable such survivor to support and maintain

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their minor children, and, for the purpose of accomplishing this end, the certificate of stock and the note and mortgage were returned to appellant, but owing to the illness of deceased a deed to the real estate was not executed by her to her husband, the appellant.

We think the evidence is insufficient to fasten upon appellant the crimes of forgery and embezzlement. He only kept what was rightfully and equitably his own. So far as the note and mortgage are concerned, there is no allegation concerning them in the petition, and no issue is tendered by the pleadings, and the findings and judgment of the trial court as to the note and mortgage are without the issue. As before stated, the appellant testified that he had no recollection of having transferred the canal stock to his wife, and had no recollection of the note and mortgage. It is not strange, however, that appellant, who testified that he had been sick a great deal, having had pneumonia eight times and typhoid pneumonia once, could not remember the details of these transactions between himself and wife, which occurred more than twenty years ago.

Holding as we do, that the evidence is insufficient to show that the deceased, Maren C. Hansen, was the owner of the canal stock, or the note and mortgage in question, 1 it is unnecessary for us to discuss the evidence as to the genuineness of the indorsement of the certificate or the release of the mortgage. We conclude that the trial court erred in charging the appellant in his account as administrator with the shares of capital stock and the note and mortgage in question.

Appellant contends that he was not chargeable with the rental value of the real estate, for the reason that it was the homestead of the family, and under Comp. Laws Utah 1917, section 7643, he and his family of minor children were entitled to occupy the same "until otherwise directed by the court," and that the court has never made any order in the matter. That section provides, in so far as applicable to this question, as follows:

"When a person dies leaving a surviving wife, husband, or

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minor children, they shall be entitled to remain in possession of the homestead and to the use of the property exempt from execution until otherwise directed by the court. \* \* \*

Counsel for respondent contends that upon the remarriage of the appellant his right as the surviving husband of Maren C. Hansen to occupy the homestead ceased, and cites in support of that contention two cases from California, namely, *In re Estate of Boland*, 43 Cal. 640, and *In re Still's Estate*, 117 Cal. 509, 49 Pac. 463. We think these cases are readily distinguishable from the case at bar. Each of the California cases arose upon an application to set aside a homestead under a statute of that state concerning homesteads. There appears to have been two provisions in the California statutes concerning the right of a surviving widow to a homestead in the lands of her deceased husband, namely; (1) Where during the existence of the community a homestead had been created by a compliance with the homestead act; and (2) where after the death of the husband she applied to the proper court for an order setting apart a homestead to her out of the lands of the deceased. Under the first provision, where, during the life of the husband, a family homestead has been set part, the title vests in the wife or widow by right of survivorship; and in the second the right to a homestead is acquired by making application to the proper court and obtaining an order setting apart a homestead. In the *Boland Case* the court said:

"Conceding, for the purpose of this case, that the property in question could be set apart to the widow, under the provisions of the Probate Act, notwithstanding the will of John Boland, it is evident that the widow could acquire no homestead interest in the property until an order of the probate court, or judge, was made, setting it apart to her. It differs from the case of a homestead created during the existence of the community, by a compliance with the provisions of the homestead act, the title to which vests in the wife upon the death of the husband, by right of survivorship. In the latter case the property becomes the property of the widow by operation of law. In the case presented it could only become hers by the decree of the court or judge."

It will be observed that it is there held that the right to

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have a homestead set apart after the death of the husband is determined by her status at the time the order is made, and that, since the order can be made only upon application of the widow, if she has remarried and is no longer a widow and head of the family, no homestead can be set apart to her.

Under Comp. Laws Utah 1917, section 7643, the right to remain in the possession of the homestead vests in the surviving spouse by operation of law upon the death of the husband or wife, without any order of any court, and this right continues "until otherwise directed by the court." It will thus be seen that under the provisions of the laws of California, under which the decisions referred to were made, it requires an affirmative act upon the part of the court or judge to entitle the widow to any homestead right in the property of her deceased husband, while under section 7643, supra, the homestead right attaches upon the death of the husband or wife, and it requires an affirmative act to terminate such right. In other words, in this state, upon the death of the husband or wife, the surviving spouse, by operation of law, is vested with the right of occupancy and use of the homestead, and this right continues, according to the express terms of the statute, "until otherwise directed by the court." No doubt the court would, upon application of any person interested in the estate, and upon a showing that justice required that this right to the occupancy and use of the homestead should be terminated, enter an order to that effect; but the remedy of a person interested in the estate is to apply to the court for an order directing the termination of such occupancy and use, and not in a proceeding to compel the surviving spouse to pay rental for the land.

It follows that, since no order has ever been made terminating the right of the appellant to occupy the lands in question, which constituted the homestead of the family at and prior to the death of Maren C. Hansen, he had a right under the law to occupy the same, and is not chargeable with the payment of rent therefor, and that the trial court erred in charging him with such rental value in the settlement of his account. 2

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It is contended, however, by respondent, that the appellant never claimed the right to occupy the lands as surviving husband of Maren C. Hansen, and that during the trial his former counsel waived any such right by his admission that appellant was liable for the reasonable rental value of the lands; but we think this was but an admission of a legal conclusion and is binding neither upon appellant nor upon the court. It is the duty of the court to declare the law as it exists, regardless of what a party or his counsel may concede to be the law. 1 Sutherland, Code Pleading, 427; *Russell v. Wheeler*, 129 Mich. 41, 88 N. W. 73. 3

It is due to the learned trial judge who heard the case below to say that the many admissions of this character made by the former counsel of appellant were calculated to mislead the court in the hurry of the trial; but a careful reading of the record discloses the fact that after the change of counsel was made the present counsel for appellant objected to any evidence of the rental value of the premises on the express ground that the appellant and his minor children were entitled to occupy the premises "until otherwise directed by the court."

The trial court also refused to allow the appellant any credit in his account as administrator for funeral expenses, or the expenses of the last illness of the deceased, or for taxes paid on the real estate, or for permanent improvements placed thereon. The record does not disclose just why all of these claims were disallowed, but it was presumably on the theory that they must have been presented to the judge within the time fixed for the presentation of claims and must have been allowed by him. Comp. Laws Utah 1917, section 7666, reads as follows:

"The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses and expenses of the last sickness and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until the payment has been ordered by the court."

Under this section claims for funeral expenses and expenses of the last sickness of the deceased person are not required

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to be presented as other claims, but may be paid by the administrator without having been presented and allowed. Indeed, the statute requires him to pay such expenses as soon as he has sufficient funds in his hands. Of course, in his final settlement, the administrator should be required to prove to the satisfaction of the court the payment of such claims and that they are reasonable and just. Section 7750 provides that if upon the settlement of the account of an administrator—"It appears that the debts against the deceased have been paid without the affidavit and allowance prescribed by statute, and it shall be proven by competent evidence to the satisfaction of the court that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-off, and that the estate is solvent, it shall be the duty of the said court to allow the said sum so paid in the settlement of said accounts."

This section clearly confers upon the court ample authority to allow the administrator credit for any claims actually paid by him upon producing the proof required 4, 5 therein; and, indeed, it is the duty of the court to allow credit for claims so paid upon satisfactory proof of the required facts. The appellant is therefore entitled to credit for any debts against the deceased which were actually paid by him in good faith, upon making satisfactory proof to the court "that such debts were justly due and that the amount paid was the true amount of such indebtedness over and above all payments or set-off, and that the estate is solvent," notwithstanding no claim or claims for such indebtedness has been presented and allowed as provided by the Probate Code. In paying any claims, without requiring their presentation and allowance, the administrator acts at his peril; that is, he assumes the burden of proving all the facts required by the last-mentioned section to be proven to the satisfaction of the court. Such payments are not to be encouraged, and when made the proof should be clear and convincing to entitle him to credit in the settlement of his account; but when such proof is satisfactory to the court the law makes it the duty of the court to allow the sum so paid in settlement of the final account of the administrator.

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Comp. Laws Utah 1917, section 7767, reads as follows:

"Before any decree of distribution of an estate is made, the court must be satisfied, by the oath of the executor or administrator, or otherwise, that all state, county, and municipal taxes legally levied upon personal property of the estate have been fully paid."

It is, we think, likewise the duty of the administrator to pay all taxes legally levied against the real estate. In this case it is undisputed that the appellant paid all the taxes levied against the lands belonging to the estate, and it is difficult to understand why he should not be credited with such payment in the settlement of his accounts. Indeed counsel for the respondent has not contended otherwise in his brief, and upon the oral argument only contended that no credit could be given for any payment made prior to his appointment as administrator, since such payment must have been made by him personally, and not as administrator. If the appellant had been a stranger to the estate, and not interested therein, there would be much force to this contention, as he would, under such circumstances, have been an inter- 6 meddler, voluntarily paying taxes of another. But the appellant was one of the heirs of Maren C. Hansen, and as such, and as the father of her minor children, was interested in preserving the estate by preventing it from being sold for taxes. He was, therefore, acting within his rights in paying the taxes out of his own funds, and is entitled to credit for all the taxes paid, together with interest thereon from the date of payment, whether paid before or after his appointment. The cause appears to have been tried upon the theory that the appellant occupied a position in no way different from a person who was a stranger to the estate, except in his capacity as administrator, and this probably led to the application of erroneous principles of law in determining this question and that of the payment of rentals.

As we have before stated, the court disallowed all of the claims of the appellant for improvements and repairs made on the premises. This presents a more difficult question than does the claim for taxes which we have been discussing. Comp. Laws Utah 1917, section 7718, provides, *inter alia*,

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that an administrator "must keep in good tenantable repair all houses, buildings, and fixtures" on real estate under his control. Section 7739 provides that "he shall be allowed all necessary expenses in the care, management, and settlement of the estate." Under these provisions we have no doubt that the appellant is entitled to credit for expenses incurred in making repairs on the existing buildings, such as putting in new floors, putting on new roof, and other necessary repairs, or for the repair of existing fences; but the question is: Is he entitled to credit for any new buildings? Our statute on this subject is identical with the California statute on the same subject, and in the case of *In re Clos' Estate*, 110 Cal. 494, 42 Pac. 971, it was held that where an old building becomes untenable, and it was impractical to repair it, a new building might be erected and its erection might be treated as repairs. We quote the first and third paragraphs of the syllabus in that case:

"1. An executrix of an estate, part of the buildings on which had been used for years as stables, on complaint as to their unsafe condition, consulted architects in regard to repairing the same, but was informed that, since the buildings were within the fire limits of the city, an ordinance required fireproof roofs and walls. It appeared that the premises were practically untenable, because of the condition of the stables. *Held*, that the erection of new buildings at a reasonable cost on the site of the old for the same purposes, and in compliance with the ordinance, were 'repairs,' within Code Civ. Proc. section 1452, requiring executors to 'keep in good, tenantable repair all houses, buildings, and fixtures' on the estate, so that the executrix was entitled to credit for the expense thereof on her accounting."

"3. An executrix need not show, as a condition precedent to the allowance of a claim for the expense of repairs on the estate, that the repairs were ordered by the probate court, where the expense was reasonable, and for the benefit of the estate."

It is impossible to lay down any hard and fast rule to govern in matters of this kind. Much must necessarily be left to the judgment and sound discretion of the trial judge, but we approve of the statement of the Court of Appeals of New York in *In re Niles*, 113 N. Y. 547, 21 N. E. 687, in the following language:

"This matter of the administration of estates is one which is



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peculiarly within the cognizance of equity, and a Surrogate's Court, in adjusting the accounts of executors and administrators, is governed by principles of equity as well as of law. *Upson v. Badeau*, 3 Bradf. Sur. [N. Y.] 15. Within the exercise of the statutory powers conferred upon him to direct and control the conduct and to settle the accounts of administrators and executors, the surrogate is not fettered; nor is he prevented by any rule of law from doing exact justice to the parties."

While section 7718, *supra*, does not in express terms require an executor or administrator to do more than to keep in good tenable repair all houses, buildings, and fixtures of the estate, section 7739 provides that he shall be allowed all necessary expenses in the care, management, and settlement of the estate, and we think this provision is broad enough to include such permanent improvements on the land as are reasonably necessary for its occupancy and to preserve 7, 8 the estate and enhance its value. *The better practice, however, and the one which the district courts should insist upon under ordinary circumstances, is for the executor or administrator to apply to the court in which the estate is being administered for authority to make such improvements. If an executor or administrator chooses to make such improvements without first obtaining authority to do so from the court, he acts at his peril, and assumes the burden of proving that the improvements were necessary, and were made in good faith and for the benefit of the estate, and the proof of these facts should be clear and convincing.* The question of the allowance for improvements must be determined from the facts in each particular case, bearing in mind that such improvements must be proven to have been reasonably necessary and made in good faith for the benefit of the estate. Take the matter of sinking a well. If there is no water on or in connection with the premises suitable for domestic purposes, in view of the indispensable necessity for pure wholesome water for such purposes, and the further fact that its acquisition will add permanently to the value of the estate, we think it rests in the sound discretion and good judgment of the court to allow the administrator the expenses necessarily incurred in that behalf; but all the facts and circumstances should be

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taken into consideration and the matter determined upon the principles of justice and equity.

In this case we think appellant is clearly entitled to the allowance of any expenditures necessarily made in repairing houses, buildings, or fences existing on the premises at the time of the death of Maren C. Hansen, but that in view of the fact that the appellant, with his family, had the use and occupancy of the premises, it is a matter for the district court to determine, from all the facts and circumstances, whether or not appellant should be allowed credit for new additions to the house, and for the erection of a barn, the construction of new fences, and the sinking of wells, in the settlement of his account. In determining this question the court should take into consideration the evidence as to the condition of the premises, and their state of improvement and value at the time of the death of the decedent, and their condition, state of improvement, and value at the date of the settlement of the account of the administrator, and from all these facts determine what, if any, credits the administrator is entitled to in the settlement of his accounts for expenses incurred in the making of new improvements of the premises; it appearing without dispute that at the date of the death of Maren C. Hansen the land had but little improvements thereon, and that the buildings and fences were of small value, while a witness for the respondent testified that the farm, at the time of the trial, was in a high state of cultivation, and one of the best in the locality. These are matters to be considered in determining the rights and equities of the parties.

If the judgment of the trial court is allowed to stand, respondent, without any expense whatever to her or to the estate, in the care and improvement of the property, or the payment of taxes, would receive from the estate approximately four times the value of the real estate at the time of the death of her mother, and also her distributive share of the real estate in its greatly improved condition and enhanced value, as well as her distributive share of the twenty-four shares of canal stock, while the appellant, in his declining years, would be turned from the home he has established and

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improved by a quarter of a century of toil, penniless. We cannot give our approval to a rule of law which would result in a judgment so harsh.

As to the claim made by the appellant for the cost of the erection of the windmill placed on the premises, this being an improvement of a temporary character and \$9, 10 necessitated mainly for the convenience of the appellant while occupying the premises, we think he would not be entitled to credit therefor. Nor do we think he is entitled to credit for the \$500 paid in satisfaction of the two notes, one given to Newman and the other to Neilson, as we think the only reasonable inference to be drawn from the evidence is that those notes were given for money borrowed by appellant for his own use, and that his wife signed them merely as surety, and that appellant, in paying those notes, was paying his own debt, and, of course, in such an event, would not be entitled to charge any portion thereof to the estate. The evidence upon this subject is somewhat meager, and we do not attempt to make any final determination of the matter, but leave the question open, to be determined by the district court in the final settlement of the accounts of the administrator.

The appellant contends that the court erred in refusing to allow him to amend his answer by alleging that he had contracted with the respondent for the purchase of her interest in the real estate in question and had paid the consideration therefor, and also in holding that the respondent was the owner of an undivided two-fifteenths interest in the real estate. This proceeding, however, being one to compel an accounting by the administrator, and for his removal, and the appointment of a successor, these questions cannot properly be determined in this proceeding, but may arise upon the distribution of the estate, or in an action by the appellant to compel the respondent to convey her interest in the estate, should he elect to bring such an action.

The judgment is reversed, and the cause remanded to the district court of Salt Lake county, with directions to set aside the findings of fact, conclusions of law, and judgment, to deny the petition for the removal of the appellant, as ad-

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ministrator, to grant a rehearing upon the account of the administrator, and to settle such account in accordance with views expressed herein. Appellant to recover costs on this appeal.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

WEBER, J., being disqualified, did not participate in the disposition of this case.

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MURRAY CITY v. INDUSTRIAL COMMISSION OF UTAH.

No. 3372. Decided July 31, 1919. (183 Pac. 331.)

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF COMMISSION—EVIDENCE OF INJURY—SUFFICIENCY. Findings of the Industrial Commission that a city employé petitioning for compensation was injured in the course of his employment, and that his injury by a slight blow on the neck with a shovel handle was the immediate cause of a paralytic stroke following shortly after the accident held supported by evidence given by the attending physician.<sup>1</sup>

Appeal from District Court, Third District, Salt Lake County; *P. C. Evans*, Judge.

Action by Murray City against the Industrial Commission of Utah, to set aside its award under the Workmen's Compensation Act. From a judgment or order for plaintiff vacating and setting aside the award, the Commission appeals.

REVERSED, and cause remanded with directions to set aside the order and judgment and to dismiss the complaint.

*Dan B. Shields*, Atty. Gen., and *H. Van Dam, Jr.*, Asst. Atty. Gen., for appellant.

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<sup>1</sup> Citing *Industrial Com. v. Evans*, 52 Utah, 394, 174 Pac. 825; *Garfield Smelting Co. v. Industrial Com.*, 53 Utah, 133, 178 Pac. 57.

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*D. W. Moffat* of Murray, for respondent.

GIDEON, J.

It is admitted that the plaintiff, Murray City, as an employer, is subject to the provisions of the act of the Legislature commonly known as the Industrial Commission Act. It appears that on or about August 25, 1917, one David Hazeldine was employed by the plaintiff city, and was at that date assisting in loading with a shovel slag upon a wagon. Charles White, a teamster, in leveling the slag thrown upon the wagon, while in the act of bringing back his shovel, struck Hazeldine a very slight blow on the neck with one end of the shovel handle. A state of paralysis followed, which particularly affected the left side of the body. A petition was filed by Hazeldine with the defendant commission praying for such relief as he might be entitled to receive. Hearing was had, and an order made by the commission, directing that the plaintiff, Murray City, pay to the claimant, Hazeldine, the sum of eight dollars and seventy-three cents per week beginning September 5, 1917, and to continue so long as the disability lasts. Thereafter, on petition of Murray City, a rehearing was granted and additional testimony taken, whereupon the commission adhered to and reaffirmed its former decision. The plaintiff city, being dissatisfied with the award of the commission, in pursuance of Comp. Laws Utah 1917, section 3087, being section 27 of the original act of 1917, filed its complaint in the district court of Salt Lake county, asking that said award be set aside, vacated, or amended, on the ground that the decision was unreasonable and unlawful, and that said decision was not supported by evidence, but was contrary to the evidence, and that the applicant did not receive a personal injury by accident arising out of and in the course of his employment. To that complaint the commission answered, making certain admissions and denials. Among other things it was alleged "that the court is without jurisdiction to hear evidence in the case, and that its jurisdiction is limited to reviewing the record made by the commission." To

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the answer was attached and filed with the clerk of the court a copy of the proceedings and testimony taken before the commission. The trial court seems to have treated the answer as a demurrer, and, after argument, overruled the same, entered judgment in favor of the plaintiff city vacating and setting aside the award made by the defendant commission. From that judgment or order the commission appeals to this court.

There is no dispute that the petitioner Hazeldine was, on the date mentioned, in the employ of the city. Neither is there any dispute that he received a slight blow in the course of his employment from the end of the shovel handle in the hands of the witness White, either by Hazeldine walking against it or by White pulling it back in leveling the slag upon his wagon. It is also conceded that it was not such a blow or contact as to cause any abrasion or make any mark or bruise upon the skin. Immediately following this, however, Hazeldine became sick; was given some assistance by his fellow workmen; was later, during the same afternoon, taken to the physician's office. On the following morning paralysis had developed so as to be, as stated by the doctor, complete.

The question for determination by this court is: Is there any substantial evidence in the record to support the finding of the commission that the injury resulted from an accident received while in the course of employment?

It is conceded in the argument of counsel for Murray City that if the evidence of the physician connects the stroke of paralysis with the injury the decision of the Industrial Commission should be sustained. It is likewise conceded by the Attorney General, appearing for the commission, that if the award can be supported such support must be found in the testimony of the attending physician. Dr. Rothwell, as his is the only testimony that connects the paralysis with the accident. We think it advisable, therefore, to set out all of the testimony given by the physician bearing upon or material to the finding of the commission on that point. It is as follows:

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"Q. Do you know anything as to an injury sustained by him on or about the 17th day of August, 1917? A. Yes. Q. State, Doctor, what the nature of it was and the condition in which you found him? A. Mr. Hazeldine was brought to my office in a buggy on that day by two other men, I believe, and they told me at that time that he had been struck in the neck with the handle, I believe, of a shovel; and at that time he had been struck, I believe, in the left side of his neck, and his head was turned very far to that side. On examination at that time he didn't show any bruise or contusion at the point of injury, and I heard from him the next day. \* \* \* I went down to see him and at the time he had a left-sided paralysis. I kept him in bed for a long time with that, and it is gradually getting better. \* \* \*

Q. Well, Doctor, was there any contusion or mark around the area of the injury developed subsequent to the first examination? A. No, sir. Q. Did you connect, in any way, the injury with his stroke of paralysis? A. Well, in this way: Of course, as far as the tap on the neck went, that would not give him the paralysis on the same side. His injury has got to be here (pointing to the base of the skull), but the way I look at Mr. Hazeldine's case, he doubtless, was carrying at that time a high-blood pressure, as tests with the instruments have since shown, and I have no doubt he was at the time of his injury, and he was working for the city on a hot August day, in a black slag dump, just about as hot a condition as you could get a man to work in. In fact, the heat was terrific, and that would tend to make his pressure higher. He was struck in the neck, and it was started by his being struck; and he, I suppose, had jumped back, and that is when the thing happened. That is, started in in scaring him a little bit, in connection with the already high-blood pressure, and augmented it, and he burst a blood vessel in the right side of the brain. Q. And you call this a stroke of apoplexy, or how do you designate it? A. Yes; a stroke of paralysis. Q. Now, do you say that this accident—while it in itself was not wholly the cause of the stroke—but would you say that it was the proximate cause? A. I would say so, Mr. Nebeker. As I would look at it, the condition is much the same as if we had a loaded cannon in this room and everything ready to be fired off. Let some one touch it off as the accident touched his off, and the whole character is changed. Q. Now, do you make any connection or relation with the fact of him being hit on the left side of the neck with his paralysis on the left side? A. No; nothing whatever. Q. Is it not a fact, Doctor, that an injury on the one side would more likely have an effect on the opposite side? A. Yes, absolutely. The only way it could happen to give him the paralysis would be to give him a fracture of the vertebræ in the neck. Then

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it would cross over, for they cross over right at the base of the brain. \* \* \* Q. Now, Doctor, how soon after receiving that accident would you say from your experience as a physician that this stroke followed the accident? A. Well, now, I saw him, as I remember, around 5 o'clock in the afternoon, and he had it the next morning. It was complete the next morning. It was not complete that afternoon. Of course these things all depend on the size of the vessel that bursts. If it is a very small vessel it takes a long time to form a clot in the brain to destroy the nerve centers; while a large vessel can destroy it immediately in such a manner as to cause instant death. Q. Could you tell at your first examination, at the time he was brought to your office immediately following the accident—did you determine at that time that he was suffering from a stroke? A. No; he was not. He was suffering from what we call shock, but it had not made itself evident as paralysis. Q. Is there any evidence in your mind that the shock received from the accident was the proximate cause of this stroke, or— A. Well let me see if my idea of the proximate cause is the same as yours. Q. Would it have happened if the accident had not been sustained? A. Perhaps. As I say, that blood pressure was there, and everything was there to cause a rupture of the blood vessel, but whether or not it would ever have ruptured of its own accord no one can tell. Q. You believe, then, that the accident would aggravate or accelerate the process of the action? A. Yes, sir. Q. Did he sustain what you would call a severe stroke, to clear up as quickly as it has, or a light stroke? A. Well, rather a light stroke, to clear up as quickly as it has."

The commission made findings, and from such findings deduced the following conclusion:

"In view of the extreme hot weather, age of the applicant, and the obvious susceptibility of applicant to suffer a paralytic stroke at the time of the accident, the fact that no evidence of sickness or distress was apparent immediately before the blow, that a strange feeling, sickness, and a paralytic stroke developed in usual time immediately following the blow, it is reasonable to conclude that the blow from the shovel, received accidentally and arising out of and in the course of his employment by the defendant corporation, was the proximate cause of the disability suffered by applicant, and an award of compensation should be made accordingly."

It is the contention of Murray City that there is nothing in the testimony of the physician to support the finding that Hazeldine was injured while in the course of his employment,



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and that, if injured, then the slight stroke which he received could not have produced the paralytic condition that followed.

As indicated above, the only question before this court for determination is whether the above testimony of the physician is sufficient to support the commission's findings. Without attempting to analyze in detail or set forth the deductions and conclusions that might be legally or logically drawn from the physician's testimony, we remark that we have no hesitancy in holding that there was testimony before the commission to support its findings, both that the applicant (petitioner) was injured in the course of his employment, and that such injury was the immediate cause of the paralytic stroke following shortly after the accident or injury. The following authorities support the conclusion reached: *Honnold, Workmen's Comp.* section 98; *La Veck v. Parke, Davis Co.*, 190 Mich. 604, 157 N. W. 72, L. R. A. 1916D, 1277; *Crowley v. City of Lowell*, 223 Mass. 288, 111 N. E. 786. Other phases of the Industrial Commission Act have been considered by this court in two cases, namely *Industrial Co. v. Evans*, 52 Utah, 394, 174 Pac. 825; *Garfield Smelting Co. v. Industrial Com.*, 53 Utah, 133, 178 Pac. 57.

It follows from the foregoing that the district court erred in entering judgment setting aside the award of the commission. The judgment of the lower court is therefore reversed, and the cause is remanded to the district court of Salt Lake county, with directions to set aside its order and judgment and to dismiss the complaint. Appellant to recover costs.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

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## STATE v. JENSON et al.

No. 3749. Decided August 30, 1919. (184 Pac. 161.)

1. INTOXICATING LIQUORS—IN FORFEITURE PROCEEDING CREDIBILITY OF WITNESSES FOR JURY. In search, seizure, and forfeiture proceedings under the Prohibition Act, against certain intoxicating liquors, vessels, and an automobile used to transport them into the state, the credibility of the witnesses was peculiarly within the province of the district court, which was not bound by the statements of defendants, particularly where the inferences deducible from the undisputed facts were contrary to such statements. (Page 53.)
2. INTOXICATING LIQUORS—AUTOMOBILES IN ILLEGAL TRANSPORTATION FORFEITED TO STATE. The Prohibition Act confers upon the courts of Utah the power to declare forfeited to the state all automobiles used for the illegal transportation of intoxicating liquors.<sup>1</sup> (Page 53.)

FRICK, J., dissenting.

Appeal from District Court, Second District, Weber County; A. W. Agee, Judge.

Search and forfeiture proceedings by the state of Utah against Hyrum Jenson, certain intoxicating liquors, vessels, and other property unlawfully used, one Hudson automobile, C. H. Reilly, and P. B. Ryan. From the judgment forfeiting the property, defendants Reilly and Ryan appeal.

AFFIRMED.

*Dan B. Shields*, Atty. Gen., and *O. C. Dalby*, *H. Van Dam*, Jr., and *James H. Wolfe*, Asst. Attys. Gen., for the State.

*Soren X. Christensen* and *Thomas Ramage*, both of Salt Lake City, for appellants.

FRICK, J.

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<sup>1</sup> *State v. Davis*, 55 Utah, 54, 184 Pac. 161.

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Appeal from Second District.

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This is an appeal from a judgment of the district court of Weber county. The proceeding culminating in said judgment was commenced and prosecuted on behalf of the state pursuant to chapter 2, Laws of Utah 1917, commonly known as the Prohibition Act.

The questions involved all arise out of the search, seizure, and forfeiture clauses contained in the act aforesaid.

The proceedings had in the district court in this case are fairly reflected in the findings of fact and conclusions of law made by the district court, and hence it is only necessary to set forth the findings and conclusions of law, which are as follows:

"(1) That on the 1st day of November, 1918, in the county of Weber and state of Utah, and at a point in Weber canyon near what is known as Devil's Gate, the said sheriff seized 515 pints of intoxicating liquor, to wit, whisky, which was then in the possession of the defendant Jenson, as it was being transported by him in the Hudson automobile mentioned in the return or report of the said sheriff; that upon the seizure of such intoxicating liquor and automobile the said sheriff filed in this court his return and report of such seizure, stating the time and place and the reason for such seizure, and describing the said whisky and the said automobile, and that thereupon an order was issued by the judge of this court directing the sheriff to hold safely the said property so seized in his possession until it was disposed of by due process of law; that thereafter the clerk of this court fixed the twelfth day of December, 1918, as the time for hearing the said matter, and caused a notice thereof to be given to the defendant and other persons as required by law; that thereafter, on the ninth day of December, 1918, the said defendant C. H. Reilly appeared and filed his petition or pleading in this matter, claiming to be the owner of the said automobile by virtue of a certain note which is in words and figures as follows (setting forth a copy of the note), and alleging that he had no knowledge concerning the use of the said automobile in any unlawful business, and claiming ownership thereof and demanding the possession thereof; that after the evidence in the said matter had been introduced, and the court had heard the argument of counsel, the said P. B. Ryan asked and was given leave to file a complaint in said matter, claiming the ownership of said automobile.

"(2) That the said claimant, C. H. Reilly, has no right, title, or interest to or in said automobile, and that the note, a copy of which is set out in his pleading, was not given to him, but was

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given to his father, who is now dead, and that the said claimant has no right or title to said note or interest therein, as payee or assignee or otherwise.

"(3) That the said P. B. Ryan, at the time of the seizure of the said automobile, was the owner thereof, and that the said automobile was being used by the defendant Jenson in and about the business of the said Reilly, and that the intoxicating liquor in said automobile was being transported in said automobile with the knowledge and consent of and for the said Ryan, and that the said liquor, to wit, 515 pints of whisky, contained in pint bottles, was also the property of the said Ryan, and had been brought into this state from Evanston, Wyoming, for said Ryan, and for the purpose of being used and sold by said Ryan in Salt Lake City, Salt Lake county, Utah.

"(4) The court further finds that the bottles containing the said whisky and the said automobile can be used for lawful purposes, and that the public interest would be served by selling instead of destroying the same."

From the foregoing findings of fact the court states the following conclusions of law:

"That the said whisky and said automobile were owned and kept by the said P. B. Ryan with intent to be used in violation of law, and that the said whisky was brought into this state from the state of Wyoming by the said Ryan, with the intent upon the part of the said Ryan of selling and disposing of the same in violation of the law, and that the said automobile was used as an appliance or implement for the accomplishment of the said purpose, and as an end or means to enable the said Ryan to bring said whisky into this state and to dispose of the same in violation of law; and that the state of Utah is entitled to a judgment forfeiting the said whisky and the said automobile to the state of Utah, and for costs against the said C. H. Reilly and the said P. B. Ryan to be paid equally by them, and directing the said whisky to be destroyed, and bottles and automobile to be sold at public auction to the highest bidder as provided by law, and the money received therefrom to be turned over to the county treasurer of Weber county."

Judgment was accordingly entered declaring the said liquor, bottles, and automobile forfeited to the state of Utah, said liquor to be destroyed, and that the bottles and automobile be sold by the sheriff of Weber county.

The defendants Reilly and Ryan prosecute this appeal from the judgment aforesaid pursuant to Comp. Laws Utah 1917, section 3357, and their counsel insist that the district court

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erred in making the findings of fact, conclusions of law, and in entering judgment forfeiting said automobile. They urge that the findings in certain particulars are not supported by the evidence, and that the conclusions of law are contrary to the findings of fact. The principal error assigned and urged, however, is that the district court erred in holding that the act conferred power upon the court to declare the automobile forfeited.

The contention that the evidence fails to support the findings of fact in the particulars stated by counsel is without merit. While; judging from the record, the evidence in some particulars, seems to be in favor of appellants' contention, yet that, standing alone, is not controlling. The credibility of the witnesses was peculiarly within the province of the district court, and, in view of the circumstances, it was not bound to believe the statements of the defendants, and certainly not where the inferences properly deducible from the undisputed facts were contrary to those statements. 1

In view that the majority of this court has held in the case of *State v. Davis, etc.*, 55 Utah, 54, 184 Pac. 161, in which an opinion has just been filed, and which precedes this one, that the courts of this state have power to declare forfeited all automobiles which are used for the illegal transportation of intoxicating liquors, and in view that that is the only question left for consideration in this case, it is unnecessary to discuss that question further. The writer, however, dissents from the majority upon the right of the courts to declare a forfeiture of automobiles, for the reasons stated in the dissenting opinion filed in the case of *State v. Davis, etc.*, supra. 2

The judgment of the district court of Weber county is affirmed, at appellants' costs.

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## STATE v. DAVIS et al.

No. 3356. Decided August 30, 1919. (184 Pac. 161.)

1. **INTOXICATING LIQUORS—AUTOMOBILE ILLEGALLY TRANSPORTING LIQUOR SUBJECT TO FORFEITURE.** In view of Comp. Laws 1917, section 5839, requiring the provisions of the Revised Statutes to be liberally construed, and the Prohibition Law, section one, requiring liberal construction of the act, under Comp. Laws 1917, section 3359, an automobile used in the illegal transportation of liquor into Utah may be seized and forfeited as other things and other property may be forfeited in accordance with the various provisions of the Prohibition Law, the rule of *ejusdem generis* not applying in the construction of the section.<sup>1</sup> (Page 61.)
2. **INTOXICATING LIQUORS—CLAIMANT OF SEIZED AUTOMOBILE MUST SHOW OWNERSHIP AND IGNORANCE OF USE.** When intoxicating liquors have been found illegally in an automobile used for their transportation it is *prima facie* evidence that the car was being used illegally, and one desiring to recover the car must establish by a preponderance of the evidence, not beyond a reasonable doubt, the fact of his ownership, and that he had no knowledge of the illegal use. (Page 62.)
3. **INTOXICATING LIQUORS—CLAIM BY PARTIAL PAYMENT VENDOR OF AUTOMOBILE SUSTAINED.** Where an automobile is sold on installments, if the vendor or his assignee has no knowledge or information of the car's intended use in the illegal transportation of intoxicating liquors he is entitled to reclaim it when seized by the sheriff for forfeiture. (Page 63.)
4. **INTOXICATING LIQUORS—ON SEIZURE OF STOLEN AUTOMOBILE OWNER MAY RECLAIM.** If an automobile is stolen and used by the thief for the illegal transportation of intoxicating liquors, in which enterprise it is seized by the sheriff and sought to be forfeited, the owner is entitled to reclaim it. (Page 63.)

FRICK, J., dissenting.

Appeal from District Court, Second District, Morgan County; A. W. Agee, Judge.

Search and forfeiture proceedings by the state of Utah against A. F. Davis, seven hundred and forty-four pints of

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<sup>1</sup> *Koib v. Peterson*, 50 Utah, 450, 168 Pac. 97.

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whisky, two cases of gin, one Paige automobile, and certain other property unlawfully used, Mrs. F. B. Ferrand, and Charles McSwine. From judgment of forfeiture, defendants Ferrand and McSwine appeal.

JUDGMENT REVERSED and cause remanded with directions to vacate judgment and to grant appellants new trial.

*P. P. Jenson* of Salt Lake City, and *George Halverson* of Ogden, for appellants.

*Dan B. Shields*, Atty. Gen., and *O. C. Dalby*, *H. Van Dam*, Jr., and *James H. Wolfe*, Asst. Attys. Gen., for the State.

WEBER, J.

On December 12, 1918, the sheriff of Weber county, Utah, arrested defendant A. F. Davis, who was then in charge of an automobile containing 744 pints of whisky and two cases of gin. The arrest was made in Morgan county. Thereafter proceedings were instituted to forfeit the liquor and the automobile. The automobile was claimed by Mrs. F. B. Ferrand by virtue of a contract of purchase between her and the Paige Sales Company, she having purchased the machine on the partial payment plan. Charles McSwine also claimed an interest in the automobile by virtue of a title retaining note which had been transferred from the Paige Sales Company to one N. W. Miller, and by Miller to McSwine, who was the owner of the note at the time of the seizure.

Mrs. Ferrand maintained that if the automobile was used for transporting liquor it was without her knowledge or consent. She testified that the machine had been taken from her garage in Salt Lake City during the nighttime without her knowledge or consent. McSwine also asserted that he had no knowledge or information of the use to which the automobile was being put.

The case was tried in the district court to a jury who returned the following verdict:

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"\* \* \* That on the twelfth day of December, 1918, H. C. Peterson, sheriff of Weber county, state of Utah, seized the seven hundred and forty-four pints of whisky and the bottles containing the same, and twenty-four quarts of gin in two cases, with the bottles in which the same was contained, and the Paige automobile described in the return of the said H. C. Peterson, in the county of Morgan and state of Utah, and that at the time of said seizure the said whisky and gin were being unlawfully used and transported in said county and state in violation of the law of this state prohibiting the transportation, use, and possession of intoxicating liquors.

"We, the jury, further find that at the time of the seizure of said liquors they were being transported in the Paige automobile described in the return of the sheriff herein, and that said automobile was at said time kept and used in violation of the law of this state prohibiting the transportation, use, and possession of intoxicating liquors."

On this verdict a judgment of forfeiture was entered by the court. Defendants F. B. Ferrand and Charles McSwine appeal.

While not controlling, the principal and most important question in this case is whether the district court had power to forfeit the automobile which had been seized by the sheriff.

The purpose of the Prohibition Law is not only to prevent the traffic in intoxicating liquors, but also to prevent transportation and to make the state what is termed "bone dry." Comp. Laws Utah 1917, section 3343, says:

"Except as hereinafter provided, the manufacture, sale, keeping, or storing for sale in this state, or offering or exposing for sale, or importing, carrying, transporting, advertising, distributing, giving away, exchanging, dispensing or serving of liquors, are forever prohibited in this state. It shall be unlawful for any person within this state knowingly to have in his or its possession any intoxicating liquors, except as in this title provided."

How can the objects of the law be attained and how shall the law be construed? The statutes of Utah contain the answer. Comp. Laws of Utah 1917, section 5839, says:

"The Revised Statutes establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice."

Not satisfied with this mandate as to the construction of



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statutes, the Legislature, in the first section of the Prohibition Law, emphasized the subject by adopting this imperative provision:

"This entire title shall be deemed an exercise of the police powers of the state for the protection of the public health, peace, and morals, and all of its provisions shall be liberally construed for the attainment of that purpose."

The case of *Kolb v. Peterson*, 50 Utah, 450, 168 Pac. 97, involved the construction of the following section of the Prohibition Act:

"Any person who shall in any street or alley, public place, store, restaurant, hotel lobby or parlor, or in or upon any passenger coach, street car, or upon any other vehicle commonly used for the transportation of passengers, or in or about any depot, platform, waiting station or room, or at any public gathering, drink any intoxicating liquors of any kind, or shall be drunk or intoxicated shall be deemed guilty of misdemeanor." Comp. Laws, Utah, 1917, section 3361.

The court, speaking through Mr. Justice Thurman, said:

"It is also contended by the petitioner that there is no statute at all making drunkenness a crime except in the places specifically enumerated. It is admitted by respondent that there is no statute making drunkenness a crime outside of such places, unless respondent's construction of the statute in question is adopted. This contention on the one side and admission on the other presents a question of more than ordinary importance to the people of Utah.

"The history of the prohibition propaganda in this state leading up to the passage of the law in question is so recent and fresh in the minds of the people as to be a matter of common knowledge. Every political party in the state, in the political campaign of 1916, declared unequivocally in its convention in favor of absolute state-wide prohibition. The Governor and every member of the Legislature, before the election, was solemnly pledged to give force and effect to these platform declarations as soon as practicable after the Legislature convened. The purpose and object of the legislation which the people demanded was the suppression of drunkenness and intoxication in the state of Utah. The prohibition of the sale and traffic in intoxicating liquors, except under the strictest and most rigid regulation, was but means to the end that drunkenness and intoxication should cease to exist in every part of the state. The Legislature, by the law in question, even went so far as to make it unlawful for any person within

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the state to knowingly have in his possession any intoxicating liquors, except as provided in the law itself. In view of these conditions and circumstances, it seems strange and unreal, and almost unbelievable, that the Legislature could have purposely omitted to make drunkenness a crime in every part of the state, wherever it might occur, whether in the streets or other public places named in the section of the statute in question or otherwise. The suppression of drunkenness and intoxication, as above stated, was the ultimate end to be accomplished and the primary purpose for which the law was enacted. It would, indeed, be a severe impeachment of the intelligence of every member of the Legislature, the Governor and his legal advisers, if it should develop that, after all, the law fails to make drunkenness a crime except in the places specifically mentioned. \* \* \*

"We are unanimous in our opinion that the statute in question makes drunkenness and intoxication by the use of intoxicating liquors a crime, wherever and whenever it may occur at any place in the state."

No precedent is cited in that opinion, but one is made. The rules of statutory construction are not resorted to, none of them except the one cardinal rule that statutes should be so construed as to carry out the will of the people as declared by the Legislature, and in accord with the object, purpose, and spirit of the law. In the *Kolb Case* technicalities were brushed aside, and the court refused to emasculate the statute by resorting to technical rules of strict construction. Guided by the same spirit—with the determination not to depart from the plainly declared intention of the Legislature—we should consider the question now before us. No rule of construction should be invoked except as it may be necessary to ascertain the legislative intent, and no rule should be applied so as to devitalize a statute enacted for the public good. Our Prohibition Law is copied to a large extent from that of Oklahoma. At the time the present law was being discussed and enacted section 3617, Revised Laws Oklahoma 1910, provided:

"When a violation of any provision of this chapter shall occur in the presence of any sheriff, constable, marshal, or other officer having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender and seize the liquor, bars, furniture, fixtures, vessels, and appurtenances thereunto belonging so unlawfully used, and to take the same immediately before the court or judge having jurisdiction in the prem-

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ises, and there make complaint, under oath, charging the offense so committed, and he shall also make return, setting forth a particular description of the liquor and property seized, and of the place where the same was so seized, whereupon the court or judge shall issue a warrant commanding and directing the officer to hold the property so seized in his possession until discharged by due process of law, and such property shall be held and a hearing and adjudication on said return had in like manner as if the seizure had been made under a warrant therefor."

Comp. Laws Utah 1917, section 3359, is as follows:

"When a violation of any provisions of this title shall occur in the presence of any sheriff, constable, marshal, police officer, or other officer having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender and seize the intoxicating liquors, vessels, and other property so unlawfully used, and to take such offender or offenders immediately before the court or judge having jurisdiction in the premises, and there make complaint under oath, charging the offense so committed; and he shall make return, setting forth a particular description of the liquors, vessels, and other property seized, and of the place where the same were sized; whereupon the court or judge shall issue a warrant commanding and directing the officer to hold safely the property so seized in his possession until discharged in due process of law; and such property shall be held in like manner as if the seizure had been made under a warrant therefor. If any peace officer shall have probable cause to believe any person has on or about his person in any kind of receptacle, or in any vehicle under his control, liquors in any quantity, in violation of any of the provisions of this title, such peace officer shall have authority to examine such vehicle and receptacle and the contents thereof, and the finding of any liquors in the possession of any such person, or under his control, not bearing a permit of a justice of the peace or a tag or label of the Attorney General, shall be prima facie evidence that such liquors were kept for an unlawful purpose, and such person shall be forthwith arrested by such officer."

Why did the Utah legislators, instead of copying the words "liquors, bars, furniture, fixtures, vessels, and appurtenances thereunto belonging so unlawfully used," use the words, "intoxicating liquors, vessels and other property so unlawfully used"? If instead of "other property" the word "appurtenances" had been used, it might be a close question as to whether an automobile should be included as an "appurtenance"; but the words "other property" are used in their

ordinary sense, and with the evident intention of including all property that could be used for unlawful transportation. Remembering that transportation of intoxicating liquors is just as much a violation of law as the sale or possession thereof, section 3359, supra, when applied to illegal transportation of intoxicating liquor, can and should be read as follows:

*"When the illegal transportation of intoxicating liquor shall occur in the presence of any sheriff, constable, marshal, police officer, or other officer having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender and seize the intoxicating liquors, vessels, and other property so unlawfully used in the illegal transportation of such intoxicating liquors."*

"Other property so unlawfully used" means what? Does it not mean "other property so used in illegal transportation"? What other property can be used in illegal transportation? The answer is, wagons, carriages, automobiles, and vehicles of every kind so unlawfully used.

It is said that an automobile can be enjoined as a nuisance, and that proceedings can be instituted under section 3350 of the Prohibition Act, which declares all premises, buildings, boats, and other places where intoxicating liquors are manufactured, sold, bartered, kept, stored, or given away, and all liquors, bottles, glasses, kegs, pumps, bars, and other property used in connection therewith, to be common nuisances. The same section provides that any person guilty of maintaining said nuisance shall be guilty of a misdemeanor, and in the following section provision is made for enjoining and abating such nuisance by suits in equity. The sections referred to have reference to the injunction and abatement of nuisances at a fixed or definite place, so that a boat on which liquors are stored, or from which they are sold, is a place, and an automobile is, under the law, deemed a place, when used as a place of storage or sale. The provisions as to nuisance and injunctions were never intended to apply to "blockade running" automobiles. To enjoin the use of an automobile engaged in illicit transportation of intoxicating liquors would be ineffectual and abortive, and would be a proceeding not within the purview of the statute.

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Counsel contend that the rule of ejusdem generis should be invoked in construing the statute. That rule is that, when general words follow words that are particular, the former should be construed as applying to words and things of the same kind or species designated in the particular words. But this is only one of the rules of construction, and, like rules of punctuation and grammar, it has no application where the intent of the legislative act is clear. It is a rule of strict construction. Black. Interp. Laws, page 217. The Prohibition Law itself commands of us a liberal construction. It is only by strict construction, and by applying a strict and technical rule of construction, that it can be said that the words "other property" and "other things," occurring in different sections of the law, mean that "other property" or "other things" are of the same kind or species as liquors, vessels, bars, etc. The Legislature has enacted into law the common-sense rule that words and phrases are to be construed according to the context and the approved use of the 1 language. Comp. Laws Utah 1917, section 5848. Using the words "other property" in their ordinary sense, and ignoring the strict technical rules of construction because there is no necessity for invoking them when the language of the law is clear and unambiguous, there is no difficulty in arriving at the conclusion that "other property" embraces all things that may be illegally used in the transportation of contraband liquor, and that an automobile may be seized as it was by the sheriff in this case. And if lawfully seized, it may be forfeited as "other things" and "other property" may be forfeited in accordance with the various provisions of the prohibition law.

Were there no other assignments of error save that relating to the power of the court to forfeit the automobile we would affirm the judgment in this case.

Among other instructions given by the court was the following:

"I further charge you, gentlemen of the jury, that, where liquors are transported or used in violation of the laws of this state, such liquors or other property so used are subject to forfeiture; and if any person claims said liquors or other property, and that the

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same were being used without his or her knowledge or consent, against his will or her will, the burden is upon the party so claiming to prove his or her innocence in that matter; that is to say, that the said liquors or other property were so unlawfully used without his or her knowledge and consent, and against his or her will, beyond a reasonable doubt."

It is urged that it was the intention of the Legislature that trials of this kind should partake of the character and be the same substantially as criminal prosecutions, and 2 that the burden is upon the state to prove the guilt of the accused beyond a reasonable doubt. This position is untenable. The action of forfeiture under the prohibition law is in the nature of a proceeding in rem. The persons claiming the property are really not defendants, as they are denominated in the statute, but are claimants, and the burden of proof is upon them. When intoxicating liquors have been found to be illegally in an automobile or other vehicle used for transportation of intoxicating liquors, it is prima facie evidence that the automobile or other vehicle was being used illegally, and any one desiring to recover the automobile is required to establish by a preponderance of the evidence the fact of ownership, and that he had no knowledge or information regarding the use to which the automobile was being put, and that the same was not used for the illegal transportation of liquor with the consent of such claimant or owner. But we cannot agree with the learned judge of the district court that, in order to recover the property, the burden is upon the defendant to prove beyond a reasonable doubt that the same was used without his knowledge or consent. The authorities cited by the Attorney General to sustain the instruction are not convincing. It was prejudicial error to require defendants to establish their claims or their defense by proof beyond a reasonable doubt.

Another instruction given by the court was the following:

"So far as the claim of the defendant Charles McSwine is concerned, if you find that he allowed the defendant Ferrand to hold possession of the automobile and to use the same as she might choose, or to control the use of the same, then it is immaterial for the purposes of this trial whether or not he knew for what purpose said automobile was being used, since, having intrusted

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the defendant Ferrand with full possession and control thereof, he would be bound by her acts, and by any knowledge or notice, if any, that she may have had as to the purpose for which said automobile was being used."

We cannot accede to the doctrine that one who buys an automobile on the installment plan becomes the agent of the vendor who retains title. If the vendor had knowledge of the intended use of the automobile he would not be entitled to relief for forfeiture, but the vendor or his assignee who, without such guilty knowledge, transacts business in the usual course of trade, should be protected in his property rights. There is no element of agency in the contract between vendor and purchaser nor between the vendor's assignee and the purchaser. It was therefore prejudicial to give the above instruction. 3

Among the instructions requested by the defendants was the following:

"If you find from the evidence that some person other than the owner or lawful claimants thereof wrongfully took said automobile from the possession of the claimants, or one of them, and without their knowledge or consent, you cannot find for the plaintiff in this action for the forfeiture of said automobile."

If a person's automobile is stolen, and is used by the thief for the illegal transportation of intoxicating liquors, it certainly would be an act of injustice that was never contemplated by the Legislature to forfeit the owner's property. In our opinion defendants were entitled to the requested instruction. 4

Because of the errors in the instructions above referred to and the refusal to give the requested instruction the judgment is reversed. The cause is remanded to the district court of Morgan county, with directions to vacate the judgment and to grant appellants a new trial.

THURMAN, J.

There is no difference of opinion among the members of the court as to the purpose and intent of the Prohibition Law. The purpose and intent of the law is to prevent the unlawful

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use of intoxicating liquors in the state of Utah. It is expressed in Comp. Laws Utah 1917, section 3343, quoted by Mr. Justice WEBER in his separate opinion, in which I heartily concur. Everything prohibited by the provisions of that section comes equally within the penalties of the law, whether the penalty is by a fine, imprisonment, or forfeiture of property. The only question upon which we disagree is as to the power of the court under the law to adjudge the forfeiture of the automobile used in the unlawful transportation of the liquor.

It must be conceded that the transportation, carrying, or importing of intoxicating liquor for unlawful purposes within this state is prohibited to the same extent as is the manufacture or sale thereof. It is a crime of equal degree, and entails upon the wrongdoer the same penalties and forfeitures. The general intent and purpose of the law being indisputable, I see no reason for considering in detail any of its provisions except those directly pertinent to the facts of this particular case. The gist of the offense is the illegal transportation of intoxicating liquor. The instrumentality used in the unlawful transportation was the automobile in question. The order of the trial court adjudging that it be forfeited and sold is the matter complained of. The question is, was the automobile the subject of forfeiture within the purview of the law? We have already referred to the section declaring what is unlawful and prohibited. We there find that transporting intoxicating liquors for unlawful purposes is forbidden. As before stated, it is made a crime of equal magnitude with every other forbidden act. The unlawful transportation of the liquor in this case occurred in the presence of the sheriff of Weber county. He arrested the defendant, who was in charge of the automobile which at the time was carrying 744 pints of whisky and a quantity of gin. The sheriff took the automobile, whisky, and gin into his possession and held them subject to the order of the court. The court ordered that the automobile be sold and the liquor destroyed.

Comp. Laws 1917, section 3359, also quoted by Mr. Justice WEBER, in part provides that when the violation of any pro-



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vision of the act occurs in the presence of any one of the officers named, such officer may, without warrant, arrest the offender and seize the intoxicating liquors, vessels, *and other property so unlawfully used.* (Italics mine.) The remainder of the section, and other sections of the act, provide for the disposition of the property. No question is raised against the procedure adopted for disposing of the automobile if the terms of the statute authorize a forfeiture.

The doctrine is fundamental, and I assume there is no dissent, that in arriving at the intention of the Legislature the courts must give effect to the plain meaning of the language used to express the intention, and, furthermore, where the language is plain, unambiguous, unequivocal, and void of technical terms, there is no occasion for resorting to technical rules of construction. The plain and obvious meaning of the language must be adopted; anything else would be an unwarranted assumption of legislative authority.

If, then, the purpose is to ascertain the intention of the Legislature in a given case, and it is found that the Legislature has used plain, ordinary language, free from ambiguity and uncertainty, such as any intelligent layman might comprehend, we need go no further in search of the legislative intent. The Legislature has expressed it in its own language, and that is the supreme test. This I also assume is a proposition as to which there is no dissent. Mr. Justice FRICK, who has filed an opinion dissenting from the views of Mr. Justice WEBER, refers to the rule above stated as the simplest canon of interpretation, and relies on it primarily in support of his dissenting views.

We come now to a consideration of the language used by the Legislature—the language which constitutes the bone of contention in this proceeding. Bearing in mind that the act provides that the transportation of liquor for unlawful purposes is a crime, and also bearing in mind that the officer caught the defendant in the very act of committing the crime, using the automobile as an instrumentality, the section last referred to provides:

" \* \* \* It shall be the duty of such officer, without warrant,

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to arrest the offender and seize the intoxicating liquors, vessels, and other property so unlawfully used."

What is the plain, obvious meaning of the language? The intoxicating liquors and vessels are specifically enumerated. What other property was being unlawfully used in furtherance of the crime of illegally transporting the liquor? The most potent instrumentality in the perpetration of the crime was the automobile by means of which the crime was committed. We are now discussing the plain, obvious, meaning of the language used. Is there any ambiguity or uncertainty? If we will keep out of mind technical rules which, as before suggested, should only be resorted to when the meaning is obscure, is there any doubt as to what the Legislature intended? I frankly confess my inability to see any ambiguity in the language used or any obscurity as to its plain meaning and intent. These views, as far as I am concerned, amount to an absolute conviction. That, however, does not imply that I may not be mistaken. Other lawyers and judges, abler perhaps than I, with equal tenacity cling to the opposite view. If I could conceive this to be a case in which it was my duty to resort to technical rules of construction, I could no doubt find much to say in opposition to the views herein expressed. I believe I am reasonably familiar with the various rules of construction resorted to by jurists and courts in attempting to arrive at the meaning of statutes and other kinds of written or printed instruments. But I also believe that to resort to them, when without them the language is plain and the meaning is obvious, tends more to confuse than to enlighten. It befogs the mind and leaves it in a state of perplexity, whereas without resorting to such rules there would be no substantial reason for doubt.

From what has been said upon this subject it must not be conceived that the writer considers rules of construction as matters of small importance. On the contrary, I regard them as matters of the highest importance when the language of the instrument is such that its meaning is doubtful and uncertain. But, when the language of the instrument is plain and its meaning unmistakable, it is the duty of the courts to adopt

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the meaning thus expressed. It is just as much a disregard of duty on the part of the courts to resort to technical rules of construction when the Legislature itself has clearly expressed its intention as it is for the courts to read something into the statute which the Legislature did not intend. In effect, the result is ordinarily the same. In every case the probable effect is a distortion of the real meaning of the language used and consequently a perversion of the actual intention. Nevertheless, technical rules have been invoked by the appellant, and confidently relied on in this case, and therefore this attempt to express my views upon the important question under review would not be satisfactory, even to myself, if I did not make more specific reference to some of the rules in question.

The first, and perhaps most important, of the technical rules of construction to be used when the meaning of the language is in doubt, is the doctrine of *ejusdem generis*. This is especially invoked by appellant in this case and relied on as being conclusive. The meaning of the term is clearly expressed in the separate opinions of both Mr. Justice WEBER and Mr. Justice FRICK. I restate it, however, in substance only, to bring it to immediate attention in connection with these remarks. The rule is: "Where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated." Applying that rule to the present case, it is contended that the words "and other property" contained in section 3359, *supra*, being general words following an enumeration of particular things, are limited to things of the same general nature as those enumerated. In other words, it is contended that the language "and other property" means nothing more than things generally of the nature of intoxicating liquors and vessels, which are the particular things enumerated. The vice of the contention, however, rests in the fact that the language of the statute in question falls within the exception to the rule instead of within the rule itself. It will not be disputed by appellant, or any one seeking to apply the doctrine of *ejusdem generis* to the present case, that a

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fundamental exception to the doctrine exists where the particular things enumerated are greatly different from one another. Another exception exists where the things enumerated are exhaustive of all things of a like nature so that there is nothing left to which the general words can apply. The doctrine covering both of these exceptions is stated in 36 Cyc., commencing on page 1121, in the following language:

" \* \* \* Nor does the doctrine apply where the specific words of the statute signify subjects greatly different from one another, nor where the specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words or be meaningless."

See, also, 2 Words and Phrases (2d Ed.) 226.

The words of the statute in question here disclose the fact that the specific things enumerated differ greatly from one another, and also embrace all the objects of their class, so that it is necessary to give the general words a different meaning in order to give them any meaning at all. What things could differ more widely from one another, if we consider them separately and apart from each other, than the thing called "intoxicating liquor" and the things called "vessels"? A vessel has no similarity to intoxicating liquor, and from no point of view can it be considered of the same general nature or in the same class. A vessel is far more similar in its general nature to an automobile than it is to intoxicating liquor. So that we might, by a strained construction, contend that the words "and other property" include an "automobile" when it is used for carrying liquor, because in that respect, in a general way, there is some resemblance to a vessel. However, I make no such contention in this case. There is no necessity for it, and it might suggest the appearance of grasping at straws in order to uphold what I believe to be the correct view of the law. I do maintain, however, that intoxicating liquor as a thing is so widely different from "vessels" as "things" as to bring the case squarely within the first exception noted in the excerpt quoted from Cyc. The reasons for this exception to the doctrine of *eiusdem generis* is so apparent as to render it unnecessary to do more than barely mention it. When the specific things enumerated are so

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greatly different in their nature one from the other it is impossible to conceive of the general words following being held to apply only to things of the same general nature. In such case, therefore, the doctrine of ejusdem generis cannot apply. The second exception noted in the excerpt quoted from Cyc. is equally conclusive. The word "vessels" embraces every possible thing of the same kind and nature. The same may be said of the words "intoxicating liquors." They embrace and represent every kind of intoxicating liquor. If the specific things enumerated preceding the general words embrace everything of the same kind and nature, it follows that the general words "and other property" must be applied to other kinds of property or treated as meaningless. *That* the court has no right to do if it is possible to give the words some effect within the purview of legislative intent.

If I am correct in my analyses and right in my conclusions it must be conceded that the doctrine of ejusdem generis has no place in the case at bar. If it has no application here, for the reasons stated, it necessarily follows that another rule relied on by defendants has no application. If the doctrine of ejusdem generis has no application, the general words following the specific words may be applied to things superior to those enumerated as well as to things of the same general nature. If the general words were not intended to be limited to things of like nature to those enumerated in the preceding words, then the general words must be given their plain, ordinary meaning. In this case the plain, ordinary meaning of the words "and other property" embraces and includes any species of personal property in any manner used in connection with the illegal transportation of the liquor, which, as before stated, is the gist of the offense. Sutherland, Stat. Const. section 278.

The writer has had but little occasion to cite authority in support of the views herein expressed. The propositions advanced are in the main elementary. The section just cited from Sutherland, and the next succeeding section of the same work, in my judgment, state the law in a nutshell concerning the rules of construction applicable to the present case.

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It is manifest from the position here taken that it would be inconsistent and illogical for me to digress from the course of reasoning adopted, and attempt to indulge in a discussion of authorities cited in support of appellant's contention. The authorities in the main uphold the doctrine of ejusdem generis and in a proper case are unobjectionable. Some of them, as might be expected, apply the doctrine to cases in which it should not be applied; others carry it to such an extreme as to bring reproach upon the doctrine itself as a rule of construction. Take, for instance, the case of *People v. Edelstein*, 91 App. Div. 447, 86 N. Y. Supp. 861. This case arose under the Sanitary Code of the city of New York. It provides as follows:

"No person owning \* \* \* any stable or other premises, shall keep \* \* \* therein any dog or other animal which shall by noise disturb the quiet or repose of any person therein or in the vicinity, to the detriment of the life \* \* \* of any human being."

The court held that the law did not apply to a horse kept in a stable for the reason that a horse and dog are not ejusdem generis. If the court had decided the question upon the theory that a stable is ordinarily constructed for the very purpose of housing a horse, and that a horse in any event is not accustomed to making offensive or disturbing noise, the decision would have been more logical and from my point of view far more satisfactory. But the court, as is often the case, seemed to forget the real purpose of the law and the correct principles of interpretation and resorted to technical rules of construction. It unnecessarily and improperly applied the doctrine of ejusdem generis, and excluded the horse from the list of prohibited animals because it was a different type of animal, and also because it was supposed to be of superior caste. On the same principle the court would undoubtedly have excluded the braying donkey or a bawling cow, than which nothing in the form of noise made by an animal could be more disquieting or offensive. If the real purpose of the ordinance had been kept in view, it seems to me the court would at least have sought for other grounds upon which to decide the case than upon the doctrine of ejus-

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dem generis. For the reasons stated, I am not impressed with the case referred to as an authority entitled to serious consideration. Many of the other cases relied on by appellant are afflicted with a similar infirmity. They cannot stand the test of reason. But, as before stated, it is not my intention to enter upon a review of the cases relied on by appellant, however strong the temptation.

It has been suggested, however, that the penalties of fine and imprisonment provided in the prohibition law are so drastic in themselves as to preclude the idea of forfeiting the automobile by which the liquor was transported. The contention carried to its logical conclusion would exclude the idea of any forfeiture whatever in any case under the act. If the penalties of fine and imprisonment are so drastic as to preclude the idea of forfeiting an automobile used in the commission of one of the crimes designated in the act, why should they not preclude the idea of forfeiting vessels, furniture, and fixtures oftentimes of greater value than an automobile. But even conceding they were of less value, what has value to do with the question? I find no such distinction or discrimination in the act itself, and this court has no right to assume legislative functions. The logic of such contention, in its last analysis, would take away the power to forfeit any property in any case arising under the act, no matter what might be the nature of the crime committed or character of the property used in its commission.

Near the beginning of these remarks I expressed the opinion that it was not necessary, in order to ascertain the legislative intent, to refer in detail to any of the provisions of the act except such as are clearly pertinent to the facts of the case. These provisions are found in the sections already referred to, 3343 and 3359, *supra*. I am still of the opinion that these two sections construed together disclose the actual intent and purpose of the law applicable to the facts of this case in ordinary and plain language, the meaning of which is unmistakable.

It is contended, however, with a force which implies conviction, that other sections of the law should be considered.

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Section 3354, Comp. Laws Utah 1917, is especially relied on as limiting the character of the offense in connection with which the property may be seized, and also limiting the character of the property that may be seized. This section limits the offenses to unlawful possession, manufacturing, selling, bartering, giving away, or otherwise furnishing liquor or keeping it for any of such purposes. The things that may be seized are described as liquors, vessels containing them, implements, furniture and fixtures used or kept for such illegal acts. It is conceded by me that this section does not include the unlawful transportation of liquors among the crimes enumerated, nor does it include automobiles or other means of transportation among the kinds of property that may be seized. The reason, however, why it does not include transportation as an offense, or vehicles used in transportation among the things that may be seized, is, to the mind of the writer, perfectly obvious. The section which is quoted by both of my Associates whose names have been mentioned refers exclusively to offenses at some particular place where fixtures and furniture, as well as liquors, vessels, and other implements, are supposed to exist. The idea of transportation of liquor and the means of transportation are not within the terms of the language used, because in the very nature of things they have no connection with the matter which the Legislature had in mind in drafting that particular section. If this had been the only provision authorizing the seizure of property connected with violations of the law, the position of appellant would be irrefragable. But is it to be conceived that the Legislature, after having made the transportation of liquor a crime the same as other forbidden acts mentioned in the law, and after having provided for the forfeiture of other kinds of property used in connection with such crimes, to which they were peculiarly adapted, should deliberately omit to provide for the forfeiture of such instrumentalities as are used as a means of unlawfully transporting liquor and which are peculiarly adapted thereto? Of course, if the Legislature did omit to make such provision, and only provided for seizure in the cases referred to in the section we



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have just considered, that would be the end of controversy, however much one might wonder at the omission. But the Legislature did not, in my judgment, make any such omission. The law to which reference has been so frequently made, which provides that the officer, without warrant, when any offense under the law is committed in his presence, may arrest the offender and seize the intoxicating liquor, vessels, and other property so unlawfully used, plainly and explicitly authorizes the officer not only to seize the liquor and vessels, but to also seize any other property then and there used in committing the crime. This consideration makes the act harmonious as a whole. It gives consistency to the legislative intent. Instead of singling out one or more offenses for which forfeitures may be declared, and one or more kinds of property which may be forfeited when used in connection with crime, it provides the penalty of forfeiture for every offense under the law, all of which are equally pernicious and of equal magnitude. It says, in effect, no matter where the crime occurs, whether at some fixed place in a building or other structure or on one of the highways or byways of the state, the property used in connection with the crime is subject to forfeiture in order to effectuate the intent and purpose of the law. To take the provisions of section 3354, *supra*, with its limitations as to the offenses named and the kind of property that may be forfeited, and undertake to incorporate them into section 3359, *supra*, so as to limit the words "and other property" to mean only the kind of property mentioned in the former section, would, in my opinion, be nothing short of legislation. It would be to read something into the law which is not there, and hence be opposed to all the canons of construction with which I am familiar.

It having been established by the evidence beyond a reasonable doubt that the automobile was used for an unlawful purpose, it was incumbent upon the party claiming ownership of the property to not only prove his claim by a preponderance of the evidence, but likewise his ignorance of the illegal purpose for which it was used. Comp. Laws 1917, section 3357, clearly places this burden upon the party claiming owner-

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ship of the property. However, I agree with my Associates in the opinion that he is not required to establish these facts beyond a reasonable doubt. If in good faith he proves by a preponderance of the evidence that he did not consent to the illegal use of the property and had no knowledge thereof, it should not be the subject of forfeiture, whatever may have been the means by which it was procured.

I concur in a reversal of the judgment.

CORFMAN, C. J.

I concur in the opinion of Mr. Justice WEBER, and in the reasons assigned by him as to why the seizure of the automobile in question was legal, and for holding that the district court had the authority and power under the statute to order a forfeiture to the state. I am also in accord with the views expressed by Mr. Justice THURMAN, in his separate opinion, that the meaning of the statute is plain and unambiguous, and that there is no occasion to resort to technical rules of construction in order to arrive at the legislative intent.

Statutes designed, as this statute was and is declared to be, "for the protection of the public health, peace, and morals," are to be given the most liberal construction by the courts in order to attain the purpose of their enactment. Moreover, as has been pointed out by my associate Mr. Justice WEBER, the statute under consideration expressly directs that "all of its provisions shall be liberally construed for that purpose." Experience, both before and since the enactment of the statute, has taught—and it is now conceded by all members of this court—that the automobile, when employed in the transportation of intoxicating liquors within the state, is the most effective and most often used instrumentality for the evasion of the law. As to the legal right to seize and forfeit to the state the automobile, when used for the transportation, furnishing, and disposition of intoxicating liquors in violation of law, sections 3354 and 3359 give the unqualified right to seize, and section 3357, as I interpret and construe its meaning to be, clearly provides for the forfeiture. For the en-

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forcement of the law forfeitures of property used in the evasion of statutes of the character of the one we now have under consideration are not new or untried remedies. They have been imposed and upheld by the courts of England, from whence our jurisprudence was taken, since the enactment of the statute of 12 Edw. II, A. D. 1318; and in our own country under federal laws in matters pertaining to revenue for more than half a century; and by the courts of all the states since the enactment of laws regulating and prohibiting the sale, manufacture, possession, and use of intoxicating liquors. I am not unmindful that, generally speaking, forfeitures of property are not favored by the courts; that they are held to be additional penalties imposed upon the wrongdoer or violator of the law; and that such penalties are not to be imposed unless there is some statutory authorization for so doing. While express mention is not made in the statute we are now considering of automobiles, among other things enumerated as subject to seizure and forfeiture, in my judgment it would be indulging in a very violent presumption to say that it was not intended that they should be included in the expression "other property," as used in the statute in designating what may be seized and forfeited. More especially is this so when experience, both before and since the passage of the act, has taught—and it is, and has been, generally conceded—that the automobile employed in the transportation of intoxicating liquors is the most effective and most often used instrumentality for the evasion of the purpose of the statute we have under consideration. It is a matter of common knowledge that if the statute is to be made effective, and is to accomplish the purpose of its enactment, property used for the illegal transportation of intoxicating liquors within the state should be forfeited. A reading of the statute gives a deep-seated conviction that its provisions were intended to be both drastic and comprehensive in prescribing remedies for the evils it seeks to eradicate and for imposing effective penalties on those who violate, or seek to violate and evade, its provisions. To the end that the object of its enactment may be attained, the courts and the officers of the law are ex-

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pressly enjoined to give all of its provisions a liberal, not a strict, construction. In this respect I regard it as mandatory, more especially upon the courts. To deny the power of the court under this statute to forfeit automobiles used in the unlawful transportation and furnishing of intoxicating liquors is to say either that the automobile bears no relation to the evils sought to be eradicated by the statute, or that the legislative body that enacted the law had no regard whatever, when providing for its enforcement, for the well-known artifices adopted and used by those who might seek to render the act inoperative. As suggested by Mr. Justice FRICK in his dissenting opinion: "Let it be remembered that all laws of this state must be liberally construed and so as to effectuate their purposes. That has always been the rule and policy of this court."

The well-known text-writer, Henry Campbell Black, in his work on Interpretation of Laws, at page 132, lays down the following as a rule of construction:

"It is presumed that the Legislature intends to impart to its enactments such a meaning as will render them operative and effective, and to prevent persons from eluding or defeating them. Accordingly, in case of any doubt or obscurity, the construction will be such as to carry out these objects."

And in this connection this learned author further says:

"In construing a statute, of whatever class it may be, an interpretation must never be adopted which will render the act ineffectual or defeat its purpose, if it will admit of any other reasonable construction; but, on the contrary, the legislative intention to make an efficient and enforceable law must be presumed, and the construction must be such as to give it force and effect, and accomplish the purposes for which it was designed."

I very much appreciate what has been said by my learned and highly esteemed associate, Mr. Justice FRICK, that under our system of jurisprudence the courts should never assume legislative functions. I have the conscientious conviction that the statute before us, both in spirit and letter, directs the seizure not only of liquors and vessels, but "other property," in which must be included the automobile or any other instrumentality used by violators of the law in the illegal transportation, furnishing, and disposition of intoxicat-

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ing liquors within our state. As I view it, any other construction would be rendering the words "other property" meaningless. As a court acting within its proper sphere, we have no better right to read words out of a statute, when placed there with legislative intent and for the purpose of affording an effective means of enforcement of the statute, than we have to read words into the statute when not there nor intended to be by the lawmaker. In either case as a court we would be assuming purely legislative functions, and would not be administering the law as we find it.

GIDEON, J.

On the question of the power of the court to order a forfeiture of the automobile in question, which may be designated as the paramount or important question for decision, I agree in both the reasoning and the results reached by Justices WEBER and THURMAN. I concur in the reversal of the judgment for prejudicial error on the part of the trial court in its instructions to the jury. On that point I understand there is no division of opinion.

FRICK, J. (dissenting).

I regret that, after most careful reflection and consideration, I am unable to concur in either the reasoning of my associate Mr. Justice WEBER, or the conclusions reached by him upon the question of the right to confiscate or forfeit the automobile in which the intoxicating liquors in question in this proceeding were found and seized, and upon the question that the proceedings in question must be more liberally construed because they partake of the nature of civil proceedings, as hereinafter explained.

In view of the importance of the question, and in view that in my judgment some of the most elementary and important rules of interpretation, as well as some of the controlling provisions of the Prohibition Act, have either been disregarded or misapplied by my Associate in construing the act, I feel constrained to set forth my views, as briefly as may be under

the circumstances, why I cannot yield assent to the conclusions reached. For me to merely express a general dissent would, in my judgment, amount to a disregard of duty.

In order to afford the reader a better understanding of the real differences between myself and my Associate, it becomes necessary for me to refer to the various provisions of the act much more fully than he has seen fit to do. Indeed, from the very meager outline of the provisions of the act in the opinion of Mr. Justice WEBER I cannot conceive how any reader of the opinion can well arrive at any satisfactory conclusion with respect to whether the construction he has given the act is or is not the correct one.

While the act is of great length, covering twenty pages of the 1917 Laws, and for that reason it is utterly impractical to set it forth at length in an opinion, yet, in my judgment, it contains certain controlling provisions which must be constantly kept in mind if a correct interpretation is to be obtained. Those provisions should, and can, be stated in an opinion. For the purpose, therefore, of giving the reader an opportunity to pass upon the controlling provisions of the act, I shall herein set forth as many of them as I deem necessary to a full understanding of them. In doing so I shall refer to the original act, which constitutes chapter 2 of the Laws of Utah 1917. While I shall refer to the original sections of that chapter, I shall, however, also, in parenthesis, give the corresponding numbers of the sections of the act as they now exist in Comp. Laws Utah 1917.

Mr. Justice WEBER has given section 1 (3341) of the act in full, to which I shall refer later. Section 2 (3342) consists of definitions merely. Section 3 (3343) is copied in full in the opinion of Mr. Justice WEBER. Section 4 (3344) relates to the enforcement of the act, and section 5 (3345), among other things, provides that a "violation of any of the provisions" of the act, if not otherwise provided, shall be punished by the imposition of "a fine of not less than fifty dollars nor more than two hundred and ninety-nine dollars, or by imprisonment in the county jail for not less than thirty days nor more than six months, or both such fine and im-

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prisonment." It is, however, also provided that a second offense against any of the provisions of the act, except becoming intoxicated and drinking intoxicating liquors in a public place, etc., constitutes a felony, and subjects the offender to imprisonment "in the state prison at hard labor for not less than three months nor more than two years." Section 6 (3346), section 7 (3347), section 8 (3348), and section 9 (3349), while containing some matters indicating the purpose of the act, yet the provisions therein contained have no material bearing upon the real questions involved here, and hence those provisions need no further consideration. Section 10 (3350), so far as material here, provides:

"All premises, buildings, vehicles, boats, and all *other places* where intoxicating liquors are manufactured, sold, bartered, kept, stored, or given away, or used in violation of law, or where persons are permitted to resort for the drinking of intoxicating liquors as a beverage, or where intoxicating liquors are kept for use, sale, barter, or delivery, in violation of law, \* \* \* are hereby declared to be common nuisances."

"Common nuisances" may be enjoined and abated by actions in equity and the property disposed of or sold as provided in section 11 (3351). Section 12 (3352) makes all leases void in case the premises are used contrary to the provisions of the act, and section 13 (3353) makes the owner of the premises guilty if he knowingly permits them to be used contrary to the provisions of the act.

Coming now to the more important sections of the Act, I must set them forth more in detail.

Section 14 (3354), among other things, provides:

"If any district, county, city, or town attorney or any peace officer or any other person has probable cause to believe that liquors are possessed, manufactured, sold, bartered, given away, or otherwise furnished in violation of this title, or are kept for the purpose of selling, bartering, or giving away or otherwise furnishing in violation of law, it shall be the duty of any such" officer or person to file with the judge of the district court or justice of the peace written information of the facts, and the informant aforesaid "shall describe as particularly as may be the place, and the names of the persons, if known, participating in such unlawful act."

It is further provided that a warrant shall issue which

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shall command the officer to search the place or places described in the warrant, and if he finds—

“Liquors in unlawful possession or use, to arrest persons found therein in such place and bring them before said court; and to seize the said liquors *with the vessels containing them and all implements, furniture, and fixtures used or kept for such illegal acts*, and keep the same securely until final action be had thereon.”

That section further provides that, if no person is found in possession of the place searched, the officer shall, nevertheless, seize and “shall securely keep all liquor *and other things* so seized,” etc.

Section 15 (3355), among other things, provides:

“When any liquor, vessels, property, or other things, shall have been seized by virtue of any such warrant, the same shall not be discharged or returned to any person claiming the same by reason of any alleged insufficiency of description in the warrant, of the liquor, property, or place,” etc.

It is, however, provided that any claimant shall have the right—

“To be heard on the merits of the case; and final judgment of conviction in such proceedings shall in all cases be a bar to all suits for the recovery of any liquors *or other things seized*, or of the value of same, or for damages alleged to arise by reason of the seizing and detention thereof.”

Section 16 (3356) merely provides that the payment of internal revenue to the United States shall be *prima facie* evidence of certain facts.

Section 17 (3357) is another very long section, which, among other things, provides that, in case any warrant is issued by a justice of the peace which shall be returned showing “that liquors, vessels, or other things *used for purposes of selling, or otherwise disposing of such liquors contrary to law*,” were found, the jurisdiction of the justice of the peace shall cease, and he shall forthwith “certify the record and all files to the district court of the county in which *said premises* are situated,” and said district court is then required to proceed to final judgment. When the papers are filed in the district court the clerk thereof “shall fix a time for hearing said matter,” and shall cause a notice “to be left at the *place*



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where said liquors were seized," and if a person is described in said warrant notice must be left at his "last known and usual place of residence." All persons claiming any interest in the things seized may, after such notice, appear "and show cause, if any they have, why said *liquors, together with the vessels in which the same are contained, and other property should not be forfeited.*" The section further provides: "Whether any person shall so appear or not, said court shall, at the time fixed, proceed to the trial of the case, and the county or district attorney shall appear before said court and prosecute said information, and show cause why said *liquors, vessels, or other property* should be adjudged forfeited." It is then further provided that "the trial of such case may be the same substantially as in the cases of criminal prosecutions before such courts." It is further provided that if any person shall appear and shall make written claim that "said liquors, vessels, or other property, or any part thereof, claimed by him, were not owned or kept with intent to be used in violation of the law, such party defendant may demand a jury to try the issue," and if the issue is found against him "the said court shall render judgment that said *liquors, vessels, or other property, or any part thereof, be forfeited.*" It is then provided that any person appearing may appeal from the judgment.

Section 18 (3358) provides: "Whenever it shall be finally decided that the *liquors, vessels or other property seized as aforesaid are forfeited,*" the court shall issue a written order directing the officer "forthwith publicly to destroy said liquors, vessels, or other property; provided, however, that if some of such property except liquors, can be used for lawful purposes," such property may be sold and the proceeds paid into the county treasury. If it is finally decided that the "liquors or other property so seized are not liable to forfeiture," the same shall be restored to the claimant, etc.

Section 19 (3359) being the one under which the automobile involved in this case was taken, I give it in full:

"When a violation of any provisions of this title shall occur in the presence of any sheriff, constable, marshal, police officer, or

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other officer having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender and seize the intoxicating liquors, vessels, and other property so unlawfully used, and to take such offender or offenders immediately before the court or judge having jurisdiction in the premises, and there make complaint under oath, charging the offense so committed; and he shall make return, setting forth a particular description of the liquors, vessels, and other property seized, and of the place where the same were seized; whereupon the court or judge shall issue a warrant commanding and directing the officer to hold safely the property so seized in his possession until discharged by due process of law; and such property shall be held in like manner as if the seizure had been made under a warrant therefor.

"If any peace officer shall have probable cause to believe any person has on or about his person in any kind of receptacle, or in any vehicle under his control, liquors in any quantity, in violation of any of the provisions of this title, such peace officer shall have authority to examine such vehicle and receptacle and the contents thereof, and the finding of any liquors in the possession of such person, or under his control, not bearing a permit of a justice of the peace or a tag or label of the Attorney General, shall be prima facie evidence that such liquors were kept for an unlawful purpose, and such person shall be forthwith arrested by such officer."

The italics in the foregoing quotations are all mine, and are used merely to direct the reader's attention to what, in my judgment, are some of the controlling provisions of the act.

The other twenty-three sections of the act, while important in many respects, nevertheless have no bearing upon the real question here involved, namely, the power of a court to forfeit automobiles and other instrumentalities used as a means in transporting liquors contrary to the provisions of the act.

In view of the foregoing, I unhesitatingly assert that if the courts of this state have the power to confiscate or forfeit automobiles or any other property which may be used as a means of transporting or carrying intoxicating liquors within this state contrary to the provisions of the act, such power must be implied from what is said in those portions of the act which I have quoted from in this opinion. Certainly no one will, nor, in my judgment, could, consistently contend that

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such a power is expressly conferred in the act. In view of that fact it becomes necessary to carefully examine the language used in the act, and from what is there said determine, if possible, the intention of the Legislature.

In order to arrive at such intention I shall invoke the simplest canon or rule of interpretation first. This rule or canon merely requires that the language used be applied and limited to the subject-matter under consideration by the lawmakers, and, unless technical terms are used, give the words employed their usual and ordinary meaning, and, if possible, give each sentence, phrase, or word used due consideration and effect. In this connection it is important to keep in mind that vehicles were clearly in the minds of the legislators in passing the act. That fact is clearly and conclusively established by referring to sections 10 (3350) and 19 (3359) of the act. In the section first referred to the term "vehicle" is, however, clearly used as designating a *place* and nothing else. It is therefore impossible, under any rule of construction, to associate the term "vehicle," as used in that section, with the idea of its use as an instrument or means of transportation. We may therefore lay section 10 out of consideration. The word "vehicle" is next used in section 19 (3359), and it is there used in connection with the right of the officer to "examine" it for the purpose of determining whether there is any intoxicating liquor in such vehicle. There is absolutely no mention or reference, either directly or indirectly, to any vehicle in any other part of the act or in connection with any use or purpose except such as I have just mentioned. Nor was it necessary to speak of or mention vehicles in the other portions of the act for the simple reason that the subject-matter of those sections (which is made manifest from the excerpts I have quoted) is the unlawful manufacture, possession, sale, giving away, or other disposition of intoxicating liquors. The property, therefore, that is spoken of in those sections, as is clearly indicated by the language used therein, was the property used in connection with the illegal manufacture, possession, sale, giving away, or other disposition of intoxicating liquors. The word "disposition," as

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here used, certainly, cannot refer to transportation. No one, I think, can or will so contend. There is not a word in any of those sections which refers to property of any kind or character that may be declared forfeited except such as is used in connection with the unlawful purposes I have just mentioned. This fact is clearly established by the language that is used in the act authorizing the seizure and forfeiture of certain property. The language there used in those sections, in and of itself, refutes the contention that automobiles and all other instrumentalities that may be used as a means of transporting or carrying intoxicating liquors contrary to the provisions of the act are subject to confiscation or forfeiture.

What, then, is the property that the act expressly authorizes to be seized? The officer is directed to seize only "the said liquors with the vessels containing them and all the implements, furniture and fixtures used or kept for such illegal acts." There is thus an express limitation respecting the character of property that may be seized, which is liquors, the vessels containing them, and all implements, furniture, and fixtures kept and used for such illegal acts. What are the illegal acts referred to? They are "that liquors are possessed, manufactured, sold, bartered, given away, or otherwise furnished in violation of this act, or are kept for the purpose of selling, bartering, or giving away or otherwise furnishing in violation of law." Those are the acts referred to, and the things named are the things that may be seized. What is said respecting the court's power to declare a forfeiture is absolutely limited to the things I have enumerated and can refer to nothing else. It is manifest that whatever terms may be used in the act in referring to the sale or forfeiture of the property seized must be limited strictly to the property authorized to be seized. What is there in the act, therefore, which authorizes the confiscation or forfeiture of automobiles or any other instrumentality that may be used merely as a means of transportation? I unhesitatingly assert that there is absolutely nothing.

But, as I understand Mr. Justice WEBER, he specially relies on section 19 (3359) as authorizing the seizure and for-

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feiture of automobiles and all other instrumentalities used as a means of transportation. Again, I most respectfully submit that there is nothing in that section which, under any rule or canon of construction, justifies such conclusion. That section, at most, authorizes the officer to "seize the intoxicating liquors, vessels and other property so unlawfully used," etc. That section, however, also authorizes such officer, in case he has probable cause to believe that any person has "in any kind of receptacle or in any vehicle under his control, liquors in any quantity, in violation of any of the provisions of this act, such peace officer *shall have authority to examine such vehicle and receptacle and the contents thereof,*" and if he finds any liquor without a permit from a justice of the peace, or having the tag or label of the Attorney General, the possession constitutes prima facie evidence that the liquors so found are "kept for an unlawful purpose, *and such person shall be forthwith arrested by such officer.*" Now, what is there in that section which authorizes the seizure, much less the confiscation or forfeiture, of the vehicle mentioned therein, whether it be a wagon, a carriage, an automobile, or what not? Here the term "vehicle" is thus expressly used, but in connection therewith the act expressly limits the right of the officer to "examine said vehicle" for the sole purpose of ascertaining whether any intoxicating liquors are contained therein. If he finds such liquors, the act expressly directs what he shall do. There is therefore nothing, either in section 19 (3359) or in any other section of the act, which confers power or authority to seize and confiscate any vehicle or automobile. A careful examination of all the provisions of the act, therefore, irresistibly leads to the conclusion that the confiscation of automobiles is not authorized.

If, in addition to the foregoing, some of the most elementary, yet important, rules of interpretation and construction are applied, the same result follows. I now refer to the general rule that when the enumeration of a special class of subjects or things is followed by a general clause in which subjects are enumerated which are not enumerated in the special class, the subjects or things that are enumerated in

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the general clause must be limited to such subjects or things as partake of the same nature as those which are enumerated in the special class. This doctrine is commonly known as the doctrine of ejusdem generis. The doctrine is frequently applied, and, under circumstances like those in this case, I may say has universally been applied. The following are a few of the numerous well-considered cases which might be cited where the doctrine has been illustrated and applied, and the exceptions stated, to which I shall refer again later: *City of St. Louis v. Laughlin*, 49 Mo. 559; *State v. South*, 136 Mo. 673, 38 S. W. 716; *Transportation Co. v. Tobin*, 19 App. D. C. 469; *Ambler v. Whipple*, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202; *Phillips v. Christian County*, 87 Ill. App. 481; *State v. Walsh*, 43 Minn. 444, 45 N. W. 721; *Ex parte Williams*, 7 Cal. Unrep. 301, 87 Pac. 565; *People v. Edelstein*, 91 App. Div. 447, 86 N. Y. Supp. 861; *Alabama v. Montague*, 117 U. S. 602, 6 Sup. Ct. 911, 29 L. Ed. 1000; *Renick v. Boyd*, 99 Pa. 555, 44 Am. Rep. 124; *State v. Schuchmann*, 133 Mo. 111, 112, 33 S. W. 35, 34 S. W. 842; *State v. Jackson*, 168 Ind. 384-389, 81 N. E. 62; *American, etc., Co. v. Virginia, etc., Co.*, 91 Va. 272, 21 S. E. 466.

In *Phillips v. Christian County*, supra, the rule is stated in the following words:

"It is a familiar rule in the construction of statutes that the enumeration of a special class of subjects, followed by a general clause intended to embrace subjects not enumerated, the general clause will be construed to include only subjects that partake of the same nature as those already mentioned."

In connection with the rule just stated there is another which is that in case any number of subjects are enumerated, which enumeration is followed by a general statement, such as "other property" or "other things," etc., the property or things contained in the general statement cannot be of a class superior to those stated in the special enumeration. The rule is well stated in *Ambler v. Whipple*, 139 Ill. at page 317, 28 N. E. at page 842, 32 Am. St. Rep. at page 206, as follows:

"It is also a general rule of statutory construction that general words, following an enumeration of particular cases, apply to cases of the same kind and description; and [such enumerated]

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things inferior shall not, by general words, be construed so as to extend to and embrace those which are superior."

It is also illustrated in *People v. Edelstein*, supra, in the following words:

"The sanitary code of the city of New York (section 195) providing that no person owning a stable or other premises shall keep therein any dog, 'or other animal' which shall, by noise, disturb any person in the vicinity, does not apply to horses kept in stables, but only to dogs and other animals of the same kind."

The only exception to the rule is that if all the inferior subjects are enumerated, and such enumeration is followed by a general statement referring to other things or other property, then, in order to give the general statement force and effect, the other things or other property may be of a class superior to those specially enumerated. If such were not the case the other things or other property mentioned would be entirely excluded from consideration, which would result in violating another cardinal rule of construction, namely, that all that is said in a statute must, if possible, be given force and effect. This latter rule has no application in this case, because when "other things" or "other property" are mentioned in the act they always refer to property used in connection with the possession, manufacture, sale, etc., of intoxicating liquors, as I have already pointed out. See, also, *Black, Interp. Laws* (2d Ed.) 207.

In any view, therefore, there is no escape from the conclusion that, in using the terms "other property" or "other things," the legislators did not and could not have intended to include automobiles, wagons, carriages, cars, and other instrumentalities used as a means of transportation, all of which instrumentalities must be included if automobiles shall be.

But there is another cogent reason why automobiles may not be included in the terms used in the act. As I have pointed out, the act provides for drastic penalties for the violation of any of its provisions. The transportation or carriage of intoxicating liquors is prohibited by the act, and in case its provisions are violated in that regard the penalty for the first offense is a fine of not less than \$50 nor more than

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\$299, while a second offense subjects the offender to imprisonment at hard labor in the state prison. The penalties for unlawfully transporting intoxicating liquors are therefore precisely the same as for any other offense under the act, except the offense of drinking intoxicating liquors or becoming intoxicated, for which offenses the lesser penalties only are permitted. It was not necessary, therefore, to impose forfeiture upon the ground that the act of transporting liquors would go unpunished or insufficiently punished. The punishment in that regard is drastic, and neither the prosecuting officers nor the courts are given any discretion, and in case any violation of the act is committed prosecution must follow, and if the evidence justifies it, and it is a second offense, the offender must be sentenced to a term in the state prison.

Mr. Justice WEBER, however, insists that the act in question in terms provides that its provisions shall be liberally construed, and that the purpose of the act is to make this state what he is pleased to term "bone dry." He also refers to Comp. Laws 1917, section 5839, which provides that the Revised Statutes shall be the law of this state upon the subjects covered by them, and their provisions shall be liberally construed, etc. He also insists that the act must be construed as though it read that all "other property so unlawfully used in the illegal transportation of such intoxicating liquors" shall be forfeited. Let it be remembered that all laws of this state must be liberally construed and so as to effectuate their purposes. That has always been the rule and policy of this court. The Prohibition Act is therefore no exception to the general rule. Liberal construction, however, to carry into effect the provisions and penalties as they are expressed in the law, is one thing, while "liberal construction" by which terms and conditions are read into a law is quite another thing. To construe the provisions of the law liberally, so as to effectuate its purposes, is not only legitimate, but is wholesome and commendable. To read terms and conditions into law is, however, not construction, but amounts to legislation, and, when attempted by the courts constitutes usurpation pure and simple. To do the latter, while always objection-



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able, becomes doubly so in enforcing penalties, confiscation, and forfeitures. Under the American system of jurisprudence no penalties, confiscation, or forfeitures can be imposed except such as are clearly expressed in the statute itself. The court may not, under the guise of "liberal construction," impose penalties not expressly provided for in the statute. To do that is quite as pernicious as to enforce them by *ex post facto* law. *Ex post facto* construction differs but little from *ex post facto* legislation. Indeed, *ex post facto* construction is far more objectionable, because, in addition to that vice it also constitutes usurpation by the courts. Let it not be assumed that because it is desirable to prevent the traffic in intoxicating liquors in this state, and to thus make the state "bone dry," and that such a result can better or only be effectively attained by confiscating or forfeiting the instrumentalities used in transporting or carrying liquors, that such a result, however laudable or desirable, justifies this court to read something into the Prohibition Act, or any other act, which is not found therein. Neither does the fact that the members of this court may think that the Legislature intended to accomplish such a result justify this court in supplying any penalty that may be omitted from the act. All persons have a right to know in advance precisely what the penalties are in case any law is, or any of its provisions are, violated. They can only know that, if the penalties are clearly expressed in the law itself. In that regard courts have no power to go beyond the penalties expressed in the law for the violation of any of its provisions. If there is one principle that the courts of England and of this country have adhered to with more tenacity than any other, it is the one that no penalties can be imposed as a punishment for any prohibited act except such as are expressed in the law itself. I shall only refer to a few of the scores of cases that could be cited on this most important subject. Among the very large number of well-considered cases which illustrate and fully support the foregoing statements, I refer to the following: *St. Louis, etc., Co. v. United States*, 110 C. C. A. 63, 188 Fed. 191; *People v. Cohen*, 94 Misc. Rep. 355, 157 N. Y. Supp. 591; *United*

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*States v. Weitzel*, 246 U. S. 533, 38 Sup. Ct. 381, 62 L. Ed. 872; *Pennsylvania Ry. Co. v. Fucello*, 91 N. J. Law, 476, 103 Atl. 988; *U. S. Assurance Ass'n v. Frederick*, 130 Ark. 12, 195 S. W. 691; *St. Louis, etc., Ry. Co. v. State*, 125 Ark. 40, 187 S. W. 1064; *State v. Palanque*, 133 La. 36, 62 South. 224; *Kitts v. Kitts*, 136 Tenn. 314, 189 S. W. 375.

It must be remembered, as I have heretofore pointed out, that the provisions of the act are highly penal, and that the penalties, other than confiscation or forfeitures are quite drastic. In referring to the question now under consideration, the court in *St. Louis Ry. Co. v. United States*, supra, said:

"A penal statute which creates and denounces a new offense, and the act under consideration is such a statute, should be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified as punishable by such a law. *The definition of offenses and the classification of offenders are legislative and not judicial functions,*" etc. (Italics mine.)

In *People v. Cohen*, supra, the Supreme Court of New York, in commenting upon a statute which, like the one in question, imposes penalties for the violation of its provisions, observed:

"In giving a construction to this section, we must bear in mind the statute makes penal the doing of something not before forbidden by law. While the language employed should be given a reasonable construction for the purpose of carrying into effect the purpose of the Legislature in framing the statute, *it cannot be enlarged so as to make penal what is not plainly written in the statute itself.* Words employed in such a statute should be given that [their] ordinary and usual meaning, and should not be so construed as to make out a crime by implication." (Italics the writer's.)

This states the law as it is enforced by all the courts of this country. If, for instance, a trial court should undertake to impose a penalty of \$300 where the statute permits only \$299, this court would, on appeal, reverse the judgment as being excessive and unauthorized. Here, however, automobiles that may be worth several thousand dollars are permitted to be confiscated upon the bare statement that they come within the designation of "other property" or "other things."

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While it is true that the district court based its power to forfeit the automobile in question upon the word "implement" as found in the statute, holding that the automobile constituted an implement yet, as I understand Mr. Justice WEBER, he does not base the court's authority upon that ground, but upon the ground that automobiles are comprehended within the phrase "other property" or "other things." Mr. Justice WEBER, therefore, does not agree with the district court in respect of the basis of authority to declare a forfeiture of automobiles. I am not surprised, however, that Mr. Justice WEBER was not impressed with the district court's basis of authority, since it is too clear for argument that the word "implement" as used in the act refers to property which is used for purposes other than transportation.

Neither does Mr. Justice WEBER agree with the dissenting member of the Supreme Court of Oklahoma in the case of *One Cadillac Automobile v. State* (Okl.) 172 Pac. 62. The dissenter there found the basis of authority to forfeit in the term "appurtenance" used in the statute. These differences between the several distinguished jurists most strikingly illustrate the wisdom of the rule of construction which has prevailed in all English speaking courts for centuries, that only such penalties as are clearly expressed in a statute should be enforced by the courts.

Before leaving the subject, however, I desire to quote a little further from the cases cited above.

In *United States v. Weitzel*, supra, the Supreme Court of the United States, in concluding the opinion, says:

"Statutes creating and defining crimes are not to be extended by intendment because the court thinks the Legislature should have made them more comprehensive." Citing cases.

I most respectfully, yet earnestly, insist that the vice of reading something into a penal statute because in his judgment the Legislature should have included it, is just what Mr. Justice WEBER is following in his opinion under the guise of what he is pleased to call "liberal construction."

The case of *Pennsylvania Ry. Co. v. Fucello*, supra, is pre-

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cisely like the case last cited. In *U. S. Assurance Ass'n v. Frederick*, supra, the rule is stated thus:

"Statutes providing penalties are strictly construed, and the penalty is not charged in any case unless there is express statutory authorization."

A moment's reflection should suffice to convince any one that this is the only safe course to follow as a guide in construing and enforcing penal statutes, and especially in confiscating or forfeiting an offender's property in addition to the imposition of a fine or imprisonment, or both, as provided for in the statute.

To the same effect is *St. Louis, etc., Ry. Co. v. State*, supra.

In *State v. Palanque*, supra, the rule is stated in the first headnote thus:

"The courts will not apply a penal statute to a case, not within the obvious meaning of the language employed, even though it be within the mischief to be remedied. What the Legislature, through inadvertence or otherwise, omits from such a statute, the courts cannot supply; their duty being to interpret, not to amend, the law."

*Kitts v. Kitts*, supra, is to the same effect.

In *State v. Le Blanc*, 115 Me. 142, 98 Atl. 119, it is said:

"A criminal offense cannot be created by inference or implication, nor can the effect of a penal statute be extended beyond the plain meaning of the language used."

In *Marter v. Repp*, 80 N. J. Law, 530, 77 Atl. 1030, a penal statute is defined thus:

"A 'penal statute' is one which enforces a forfeiture or penalty for transgressing its provisions or doing a thing prohibited. 'Penal' is a much broader term than 'criminal,' and includes many statutory enforcements of police regulations the violations of which are in no sense crimes."

As a matter of course, all the acts for which penalties provided for in the act here in question, including forfeitures, are imposed constitute crimes under our statute. Indeed, a repetition of any prohibited act, except as hereinbefore stated, constitutes a felony. In view therefore, that there can be no forfeiture except in connection with the commission of a crime, the provisions of the act in question, within the defini-

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tion of the Supreme Court of New Jersey, necessarily are both penal and criminal.

In *U. S. Fidelity & G. Co. v. Marks*, 37 Nev. 306, 142 Pac. 524, it is said:

"Penalties or forfeitures in addition to those stated in the statute should not be implied or imposed by the court."

Manifestly that is both good law and good sense.

See, also, *People v. Doyle*, 13 Cal. App. 611, 110 Pac. 458; *Price v. Board of Com'rs*, 22 Colo. App. 315, 124 Pac. 353; *Symmes v. Sierra Nevada M. Co.*, 171 Cal. 427, 153 Pac. 710.

Recurring now to the proposition that it is just as objectionable to impose penalties by ex post facto construction as it is to do so by ex post facto laws, the Circuit Court of Appeals of the Eighth Circuit, in *Martin v. United States*, 168 Fed. 198, 93 C. C. A. 484, states the law thus:

"A penal statute which creates and prescribes punishment for an offense committed by a specific class must be strictly construed. One who was not, beyond reasonable doubt, within the class by the express terms of the statute, may not be brought within it after the event by interpretation. Ex post facto law by judicial construction is as pernicious as ex post facto legislation."

In the foregoing case the judgment entered in the lower court, which is reported in 7 Ind. T. 451, 104 S. W. 678, is reversed.

I refrain from citing further cases. In case, however, the reader desires to pursue the subject further, he will find numerous cases in which the doctrine stated in the foregoing quotations is illustrated and applied by reference to the subject "Statutes" in volume 44 Cent. Dig. sections 322-323, and to the same subject in Dec. Dig. (Key-No.) section 241.

Lest I may be misunderstood, I desire to again state that I do not contend that the old rule of strict construction of criminal and penal statutes applies in this state, nor do I refer to the foregoing cases for that purpose. The act in question should receive a fair, a reasonable, and a liberal construction so as to effectuate its purpose. What I most earnestly contend for, however, is that this court cannot, by construction or implication, extend the penalties nor the forfeitures to persons or property not expressly mentioned in

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the act. To do that is to impose penalties in excess of those mentioned in the statute, which all the courts hold cannot legally be done, regardless of the doctrine of liberal construction.

It is, however, insisted by Mr. Justice WEBER that the proceedings in question are civil and not criminal, and for that reason a different or more liberal rule in declaring forfeitures applies. In making that statement I respectfully submit that he has fallen into the same error as he has in assuming that, because the act provides for liberal construction, therefore the ordinary rules of law in imposing penalties do not apply. The act, however, in terms, provides what the nature of the proceedings shall be. It provides: "The proceedings in the trial of such case may be the same substantially as in the case of criminal prosecutions before such [district] courts." The proceedings referred to are the proceedings in which forfeitures may be declared, and it is too manifest for argument that they can refer to no others. It certainly will not be contended that a person may be convicted and sentenced to the state prison for a felony in a civil proceeding; hence the proceedings referred to in the statute refer to the proceedings relating to the forfeiture of property and not to the conviction of the offender. The proceeding to forfeit is one in rem. In applying the rules of construction for which I contend, however, it is utterly immaterial whether the forfeiture proceedings are deemed civil or criminal, since the contention that a different rule of construction and procedure applies whether the proceeding be civil or criminal is thoroughly exploited by the Supreme Court of the United States in the case of *United States v. Chouteau*, 102 U. S. 611, 26 L. Ed. 246, where Mr. Justice Field, in speaking for that court, said:

"Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. \* \* \* To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless."

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That, I think, effectively disposes of the proposition that the rule of construction in enforcing penalties is different in civil cases from what it is under criminal statutes. But, as already pointed out, the act in question is both criminal and penal. Moreover, no property is subject to confiscation unless it is used in violation of the provisions of the act, and any violation of the act constitutes a crime, and if repeated a felony. The result in any case is therefore highly penal, and where the possession is known and prosecution follows it must likewise be criminal, since the prosecuting officers have no discretion, but must prosecute, and, if the evidence shows a violation of the act, the court must sentence if conviction follows prosecution.

The case of *Kolb v. Peterson*, 50 Utah, 450, 168 Pac. 97, is referred to as a precedent upon the question of liberal construction. The Kolb Case has, and can have, no bearing upon the real question involved in the case at bar. It very often happens that a court not only is justified in construing, but, as a matter of common justice, should construe, an act so as to enforce its general spirit and purpose, although the language employed therein may be obscure and unsatisfactory respecting some of the provisions of the act. That is what happened in the Kolb Case. We are, however, not now dealing with such a case. Here the question is not what is the general purpose of the act, but it is what are the penalties that are prescribed in case its provisions are violated in certain particulars. The general purpose of the act cannot be looked to for the purpose of determining what penalties shall be inflicted for a violation of its provisions. Nor is the intention of the Legislature in that regard of any consequence unless expressed in the act. It is utterly immaterial what penalties the Legislature had in mind so long as it failed to state them in the act itself. This is the logic, purport, and the spirit of all of the cases I have hereinbefore cited. The fallacy of my Associate lies in the assumption that penalties can be created by the courts by the application of the doctrine of "liberal construction." If that doctrine be once applied to the enforcement of unexpressed penalties the prece-

dent so established will, I am sure, be "more honored in the breach than in the observance."

Finally, it is urged that merely to apply the remedy of enjoining the use of automobiles, and thus prevent the illegal transportation of intoxicating liquors by them, would be "ineffectual and abortive," etc. The question is not whether the Legislature has or has not provided for these penalties to prevent the transportation of intoxicating liquors, but the question is, what are the penalties it has provided? If this court supplies, by construction and intendment, what the Legislature omitted, it necessarily transcends its powers. To do that is far more mischievous in its consequences than it would be to permit automobiles to escape forfeiture. The Legislature can cure the latter evil if it be such at any time, while the evil lurking in imposing unexpressed penalties by construction or intendment will become a precedent which may easily result in disregarding one of the most fundamental principles of our jurisprudence.

I concur most heartily in the statement that the confiscation of automobiles, when used as a means for the unlawful transportation of intoxicating liquors, would go very far in preventing, if it did not entirely prevent, the illicit traffic in such liquors. What I insist upon, however, is that the Legislature, and not the courts, should authorize their confiscation. I also unhesitatingly agree with the proposition that courts should not so construe and apply statutes as to "devitalize" them. In this connection I desire to state, however, that courts cannot well "devitalize" what never had vitality. Moreover, if forsooth a court should err in construing and applying the penal provisions of a statute, and should erroneously refuse to enforce any penalty except such as are clearly expressed therein, although the penalty in a particular case could be implied, the mischief in making such an error would, nevertheless, be infinitely less than what would necessarily result from the establishment of a precedent by the court of last resort which would authorize the courts to apply omitted penalties merely because a statute was "enacted for the public good," and unless assumed penalties are enforced



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the statute will lose some or much of its effectiveness. To err with regard to the first proposition constitutes a mere error of judgment, and violates no fundamental principle of jurisprudence; while to do the latter constitutes usurpation, and violates the underlying principles of common justice, as well as the principle upon which rests the doctrine that the state governments are divided into three independent, co-ordinate branches, neither of which may trench upon the trust and powers conferred upon any of the others. It is for the reason last stated that the courts of this country universally shrink from supplying defects in laws, and especially refuse to enlarge upon or to enforce penalties which are not clearly expressed in the statute. If, however, the court fails in the enforcement of certain statutory provisions because in its judgment they are indefinite and uncertain, the remedy is clear and within easy reach. The Legislature can supply the alleged defect, just as was done by the Legislature of Oklahoma after the Supreme Court of that state in the case hereinbefore referred to held that the Prohibition Act of that state did not authorize the confiscation of automobiles. What the Supreme Court of Oklahoma did in that case I submit this court ought to do in this. It is then up to the Legislature to say precisely to what extent property may be confiscated and forfeited for a violation of the act in question.

I have shown that in this case the court cannot err if it follow the act as written; that the act provides in explicit terms just what property may be confiscated or forfeited; that vehicles, which necessarily include automobiles, are expressly mentioned in the act, and when they are mentioned it is always in connection with something other than their use as a means of transportation, and entirely foreign to the subject of confiscation and forfeiture. Under every rule of construction, therefore, the ruling of the district court in declaring the automobile forfeited is manifestly erroneous.

Since writing the foregoing both the CHIEF JUSTICE and Mr. Justice THURMAN have handed me their opinions, in which they set forth their views for concurring with Mr. Justice WEBER. While I have the highest regard for the

views of both of my Associates yet I respectfully submit that there is practically no reason assigned in either opinion which is not expressly or inferentially covered by what is said by Mr. Justice WEBER, except, perhaps, that the CHIEF JUSTICE has added something in his concurring opinion in the statement that "sections 3354 and 3359 give the unqualified right to seize, and section 3357, as I interpret it and construe its meaning to be, clearly provides for the forfeiture." I expressly copied all the essential parts of those sections for the purpose of showing that section 3354 expressly limits the right to seize the property used for purposes other than for transportation; that section 3357 again expressly limits the confiscation or forfeiture of property that is used for other purposes; and that, in view of the language of section 3359, the term "other property" cannot be construed to mean automobiles, for the reasons: (1) Because the phrase "other property" clearly refers back to the enumerated articles theretofore mentioned in the act, and is thus given full force and effect; and (2) because in that section the term "vehicle" cannot be held to come within the phrase "other property," because "vehicle" is expressly mentioned, and the power that the officer may exercise with respect thereto is expressly defined and limited. Why provide that the officer "shall have authority to examine such vehicle" when he already had plenary authority to seize it? If the officer is empowered to seize the vehicle, and therefore an automobile, such power was conferred upon him, and it existed when the Legislature conferred the authority to examine it, and specially provided what he shall do, as I have pointed out in my opinion. It is therefore manifestly fallacious to say that in order to give the phrase "other property" any meaning we must allow confiscation and forfeiture of automobiles. The phrase "other property" is given full meaning and effect wholly independent of the right of confiscation, and therefore the rule of ejusdem generis should apply precisely as I have contended for.

In this connection I also feel constrained to remark that, in view that what I have said respecting the drastic nature of

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the penalties imposed in the act for violation of its provisions respecting the transportation of intoxicating liquors was merely said to point out that the Legislature had not overlooked that matter, and hence there was no necessity for the court to assume that the Legislature must have intended to impose some penalty for the violation of all of the provisions of the act, I fail to grasp either the necessity, or the utility of Mr. Justice THURMAN'S remarks upon that subject. This is especially true if the fact is kept in mind that I, like all other citizens, am bound by the decision of the majority. What I may say, however, binds no one, and I am doing no more than exercising the right and discharging my duty to give reasons why in my judgment, by what is said in, as well as by what is omitted from, the act, the construction placed upon it by my Associates respecting the right to confiscate automobiles is not justified. Be that as it may, however, the important fact still remains that all that is, or can be, relied on by my Associates in declaring the right to confiscate automobiles and all property that may be used for transporting or carrying intoxicating liquors contrary to the provisions of the act, which includes all property from a railroad car to a woman's handbag, is the term "other property," as that term is used in section 19 (3359). In view of that fact I can only submit what I have said to the members of a fair and impartial profession, who, in view of their knowledge of the law, are capable of forming an intelligent and just conclusion respecting the soundness or unsoundness of my views. My views as herein expressed are based on my best judgment and enforced conviction, and those are my only guides. Notwithstanding the views of my Associates, therefore, I must still insist, and I submit in all candor, that if all that is said in the act, and if the subject-matter concerning which particular language, phrases, or expressions therein used, be kept in mind, then there is not only nothing in the act from which a court can legally declare the confiscation of automobiles, but there is ample reason why such confiscation should not be judicially declared.

While, therefore, my judgment and convictions prevent me

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from concurring with my Associates respecting the right of the confiscation of automobiles and all other property that may be used as a means of transportation of intoxicating liquors contrary to the provisions of the act, I most cheerfully join them in a hearty pax vobiscum.

I concur in the reversal of the judgment upon the other ground stated by Mr. Justice WEBER.

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**BADERTSCHER v. INDEPENDENT ICE CO. et al.**

No. 3336. Decided September 5, 1919. (184 Pac. 181.) On Application for Rehearing, October 9, 1919.

1. **APPEAL AND ERROR—JOINT TORT-FEASOR DISMISSED FROM CASE NOT ENTITLED TO NOTICE OF APPEAL.** Where plaintiff sued two as joint tort-feasors, and the court dismissed the action as to one defendant, *held* that on appeal by the other defendant, who was cast below, the defendant as to whom the case was dismissed was not an adverse party on whom notice of appeal must be served.<sup>1</sup> (Page 103.)
2. **APPEAL AND ERROR—JOINT TORT-FEASOR DISMISSED FROM CASE NOT ENTITLED TO NOTICE OF APPEAL.** Where an action against two joint tort-feasors was dismissed against one, *held* that, on appeal by the remaining defendant from an adverse judgment, the one as to whom action was dismissed was not an adverse party on whom notice of appeal must be served, on the theory that it was interested in the appeal because under Comp. Laws 1917, section 6484, a party who fails in an action otherwise than upon the merits may commence a new action within one year after reversal or failure. (Page 105.)
3. **APPEAL AND ERROR—ON DISMISSAL OF JOINT TORT-FEASOR PLAINTIFF ONLY COULD ALLEGE ERROR.** Where an action against two joint tort-feasors was dismissed as to one, *held* that only the plaintiff in the action could complain of the ruling. (Page 107.)
4. **APPEAL AND ERROR—QUESTION AS TO DISMISSAL OF JOINT TORT-**

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<sup>1</sup> *Groot v. R. R. Co.*, 34 Utah, 152, 96 Pac. 1019; *Griffin v. Southern Pac. Co.*, 31 Utah, 296, 87 Pac. 1091; *Allen v. Garner*, 45 Utah, 39, 143 Pac. 228; *Langton L. & C. Co. v. Peery*, 48 Utah, 112, 159 Pac. 49.

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**FEASOR REVIEWABLE ONLY ON APPEAL BY PLAINTIFF.** Where an action against two joint tort-feasors was dismissed as to one, *held* that the ruling cannot be reviewed without appealing from the judgment immediately following the ruling. (Page 107.)

5. **APPEAL AND ERROR—RESERVATION OF EXCEPTION NECESSARY ON APPEAL FROM NONSUIT.** The sustaining of a motion by one defendant for nonsuit cannot be reviewed on appeal by the remaining defendant from an adverse judgment, where the appealing defendant saved no exception to the ruling.<sup>2</sup> (Page 107.)
6. **MASTER AND SERVANT—EMPLOYMENT OF SERVANT OF ANOTHER LIABLE FOR NEGLIGENCE.** One may be in the general service of another, and nevertheless with respect to particular service be deemed the servant of a third person, so as to render the latter liable for the servant's negligence. (Page 111.)
7. **MASTER AND SERVANT—HIREE OF TEAMS AND TEAMSTERS OF ANOTHER LIABLE FOR TEAMSTERS' NEGLIGENCE.** Where a coal company hired teams and teamsters from an ice company, the coal company having the right to direct their movements, such teamsters must, for the purpose of determining liability for their negligent acts in delivering coal, be deemed the servants of the coal company. (Page 111.)

GIDEON, J., dissenting.

Appeal from District Court, Third District, Salt Lake County; *J. Louis Brown*, Judge.

Action by Godfrey J. Badertscher against the Independent Ice Company, a corporation, and Wasatch Coal Company, a corporation. From a judgment against the last-named defendant, the case having been dismissed as to the first, the latter defendant appeals.

**AFFIRMED.**

*G. A. Iverson* and *P. G. Ellis*, both of Salt Lake City, for appellants.

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<sup>2</sup> *Stewart v. R. R.*, 39 Utah, 375, 117 Pac. 465.

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*Geo. G. Armstrong, W. E. Rydalc, and Ed. McGurri*n, all of Salt Lake City, for respondent.

FRICK, J.

Plaintiff commenced this action in the district court of Salt Lake county against the Independent Ice Company, a corporation, hereinafter called ice company, and against the Wasatch Coal Company, also a corporation, hereinafter styled coal company, to recover damages for personal injuries which he claimed to have suffered through the alleged joint negligence of the two companies.

Upon the trial of the case, after the plaintiff had introduced his evidence, the two companies filed separate motions for non-suits upon the ground that the evidence, for the reasons stated in the motions, was insufficient to take the case to the jury. The district court granted the motion of the ice company and denied that of the coal company. The case was accordingly dismissed as against the ice company, and the trial proceeded as against the coal company alone. The jury, under the instructions of the court, which are not complained of here, found a verdict in favor of the plaintiff against the coal company. Judgment was duly entered on the verdict, from which the coal company appeals, and assigns a number of errors, which we shall hereinafter consider.

In taking the appeal from the judgment against it the coal company did not serve the ice company with notice of the appeal. The plaintiff has filed a motion to dismiss the coal company's appeal upon the ground that the ice company is an adverse party, and hence a necessary party to the appeal, and, not having been served with notice of the appeal, he contends this court cannot hear the appeal for want of jurisdiction. In view that the plaintiff sued the two companies as joint wrongdoers, their precise relationship for the purposes of this motion is quite immaterial. The question, and the only question, to be determined upon the motion, is, Is the ice company an adverse, and hence a necessary, party to this appeal? In other words, would its interests, from a legal

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point of view, be affected in case the judgment against the coal company were modified or reversed? The fact that the district court, upon the evidence produced against the ice company, as a matter of law found that it was not connected with the alleged wrong or tort, and upon that ground entered a judgment dismissing the action against it, which judgment is in full force and effect, should conclusively dispose of this motion against the plaintiff's contentions. If, as a matter of law, the plaintiff has no cause of action against the ice company, in what way can that company be interested in this appeal, which is from a judgment 1 against the coal company alone, and which appeal is from that judgment only and from no other? I confess my utter inability to understand how the ice company is any longer connected with this case. Why is not the judgment of dismissal upon the grounds stated, while not appealed from, for the purposes of this appeal just as conclusive as a judgment upon the merits in defendant's favor, if not appealed from, would be? It would seem that upon a proposition so elementary no authority should be required. The following cases are, however, squarely in point: *Bliss v. Grayson*, 24 Nev. 422, 56 Pac. 231; *O'Keefe v. Omlie*, 17 N. D. 404, 117 N. W. 353; *State v. Mining Co.*, 169 Mo. App. 79, 154 S. W. 168. See, also, *Tucker v. Carlson*, 113 Iowa, 449, 85 N. W. 901.

In *Bliss v. Grayson*, supra, the court said: "Notice of appeal by a defendant need not be served on defendants who were dismissed from the action before judgment." *O'Keefe v. Omlie*, supra, is precisely to the same effect. As a matter of course such must be the case. When the judgment of dismissal was entered, which is still in full force and effect, the ice company went out of the case, and thereafter its legal relation to the defendant coal company was precisely the same as though it never had been a party at all. True, the plaintiff might have appealed from the judgment of dismissal, and might thus have continued the ice company in the case; but he did not do so, and therefore the judgment of dismissal stands. The plaintiff was, however, the only one who could

have complained of that judgment. The coal company, being sued as a joint wrongdoer, cannot legally complain because the action was dismissed against the ice company before judgment. The coal company, being a joint wrongdoer, is liable for the whole damage, and has no right of contribution against its joint wrongdoer, and hence cannot complain if the other joint wrongdoer is dismissed from the action. 1 Cooley on Torts (3d Ed.) 254; *Groot v. R. R. Co.*, 34 Utah, 152, 96 Pac. 1019; *City of Covington v. Whitney* (Ky.) 96 S. W. 907. Indeed, the coal company had no right of appeal from the judgment of dismissal. That is squarely decided in the case of *City of Covington v. Whitney*, supra, and is clearly the logic of the decision in *Groot v. R. R. Co.* It is, however, contended that the cases of *Griffin v. So. Pac. Co.*, 31 Utah, 296, 87 Pac. 1091, *Allen v. Garner*, 45 Utah, 39, 143 Pac. 228, and other cases there cited, hold to the contrary. There is no merit to the contention. In all of those cases there were joint judgments, and the party upon whom service of notice was omitted would have been affected by the modification or reversal of the judgment. The distinction between those cases and the one at bar is stated in the case of *Langton L. & C. Co. v. Peery*, 48 Utah, 112, 159 Pac. 49, in the following words:

"It will be observed, however, that the test whether a party below is a necessary party to an appeal, as laid down in that case [*Allen v. Garner*, 45 Utah, 39, 143 Pac. 228], as in all other cases emanating from this court, is that the omitted party must be affected by a modification or reversal of the judgment appealed from. If a party would not be affected he is not a necessary party, and hence to omit to serve him with notice of appeal. \* \* \* is not fatal to the appeal."

All of the Utah cases are clearly distinguishable from the case at bar, and hence have no controlling influence here.

It is, however, further contended that inasmuch as, under our statute (Comp. Laws 1917, section 6484), a party who fails in an action otherwise than upon the merits "may commence a new action within one year after the reversal or failure" of the original action, that for that reason the ice company is interested in this appeal and should have been



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served with notice. That contention entirely overlooks or ignores the real purport of the statute. What the statute permits is a "new action" which is entirely independent of the one that failed. The original action is ended, so far as the defendant against whom it was dismissed is concerned, precisely the same as though no new action could be commenced. If it be true that in this case the ice company must be served with notice because the new action could be commenced against it, if commenced within the time limited by the statute, then it is also true that in this state the joint wrongdoers have a right to be served with notice of appeal, whether parties to the action or not, for the simple reason that a new action can be commenced at any time against them, if commenced within the statutory period of limitations, so long as the damages remain unsatisfied. 2

But it is urged that the ice company is interested in maintaining the judgment against the coal company and in having it paid by that company. While that may be true, it would be no less true if the ice company had never been made a party to the action. It is true precisely the same so far as the driver of the wagon is concerned, who., because of his negligence, caused plaintiff's injury of which he here complains. So long as the damages remain unsatisfied the driver of the wagon may be sued, if sued within the statutory period of limitations, and hence he is also interested in having the coal company pay the judgment. No one would, however, seriously contend that he could come into this court and insist upon an affirmance of the judgment against the coal company. The legal status of the ice company, in view of the entry of the judgment of dismissal, is, however, precisely the same as that of the driver of the wagon. True, it was made a party to the action, but the district court found and adjudged as a matter of law that it was not responsible for the wrong, and entered judgment dismissing the action against it. The ice company, therefore, is no more a party to the action than is the driver of the wagon, and for that reason has no right to be heard on the coal company's appeal any more than the driver would have. The case of *Hum-*

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*phreys v. Hunt*, 9 Okl. 196, 59 Pac. 971, is relied on as holding to a contrary doctrine. While it is true that in that case the Supreme Court of Oklahoma has apparently arrived at a different conclusion, yet the writer confesses his utter inability to understand the legal principle upon which the decision in that case rests. Another case is also relied on, namely, *Bullock v. Taylor*, 112 Cal. 147, 44 Pac. 457. That case is a case of joint contractual liability, and, in addition to that, it seems from that case that an appeal by any party to the action brings up the whole cause for review. Such is not the case in this jurisdiction. Here there is no appeal except from a final judgment. A party, in order to be entitled to have rulings occurring during the trial reviewed, must appeal from the final judgment. An appeal may also be taken from any judgment, if there be more than one in the case, and from any independent part of a judgment. In this case the judgment of dismissal in favor of the ice company is clearly a separate and independent judgment, has no connection with the judgment against the coal company, and an appeal by the coal company from the judgment against it in no way affects the judgment of dismissal. Besides, as we have seen, the plaintiff is the only one who could have assailed the judgment against the coal company by an appeal, and he did not do so. Neither the case from Oklahoma nor the one from California has any bearing upon this motion. Moreover, this court, in a number of unreported cases, refused to dismiss appeals upon the ground that a joint wrongdoer, against whom the action was dismissed in the court below, was not served with notice of appeal to this court. The rulings in those cases are manifestly sound and should be adhered to.

Finally, it is contended that, inasmuch as the coal company has assigned the ruling of the district court in sustaining the ice company's motion for a nonsuit as error, for that reason it should have been served with notice. I have already pointed out that the coal company cannot legally complain of that ruling, and that in no event could the ruling be reviewed without appealing from the judgment following

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the ruling. Both of the foregoing reasons are conclusive against the motion. It would be strange doctrine, however, because a party asks too much, that, for that reason, the court is ousted of jurisdiction. If that doctrine prevailed this court would have to be abolished for want of something to do. But even if the coal company had the right to complain of the ruling of the district court in sustaining the ice company's motion for a nonsuit, yet this court would be powerless to review the ruling, because the coal company saved no exception to the ruling. Without such an exception we cannot review the ruling on the motion for a nonsuit. *Stewart v. R. R.*, 39 Utah, 375, 117 Pac. 465. The motion to dismiss the appeal must, therefore, be denied. 3-5

This brings us to the merits of the appeal.

Plaintiff's evidence, which is material here, at the time the coal company interposed its motion for a nonsuit, was, in substance, as follows: The coal company was engaged in the retail coal business at Salt Lake City. The ice company was engaged in the ice business. During the winter season the ice company had a surplus of men and teams, while the coal company did not always have sufficient men and teams to deliver coal to its customers as ordered by them. The coal company applied to the ice company for teams and men, and for the running gears of wagons. Whenever the coal company desired men and teams it would apply to the ice company, and the ice company would then order some of the teamsters in its employ to report to the coal company with teams and the running gears of wagons. The coal company furnished the wagon boxes in which the coal was hauled, on which boxes the name of the coal company was printed in large letters. After the box was placed on the running gear of a wagon, the teamster with the team and wagon would report to the foreman of the coal company at its coal yard, and the foreman would then direct the teamster where to load the coal and to whom to deliver the same. If the coal was delivered C. O. D. the teamster would also collect the price of the coal, and in addition thereto the additional cost of delivery, which in this case was one dollar per ton. When the

coal was to be delivered C. O. D., and the customer did not pay therefor, the coal was taken back to the coal company's yard by the teamster. The extra amount that was collected by the coal company for delivering the coal to its customers, in this instance one dollar per ton, was divided between the ice company and its teamsters. The ice company, however, settled with the teamsters periodically. The relationship of the coal company and the ice company and its teamsters was that the ice company hired the teamsters, furnished the teams and running gears of the wagons; the coal company furnished the coal and the wagon boxes and the customers to whom the coal was to be delivered; and the teamsters did the work incident to the delivery of the coal, and in case the coal was delivered C. O. D. collected the price of the coal plus the cost of delivering, in this instance, one dollar per ton, and would account to the coal company for the price of the coal. At the time the motion for a nonsuit was interposed it was uncertain whether the teamster whose alleged negligence caused plaintiff's injury was one of the ice company's teamsters or whether he was hired by the coal company. The team and wagon-gear, however, belonged to the ice company, while the wagon box belonged to the coal company. We shall consider this case, however, as though the teamster was employed by the ice company, was paid by it from time to time, and was sent to the coal company to deliver coal as hereinbefore stated.

On the evening of November 2, 1917, one of the teamsters aforesaid undertook to deliver a wagon load of coal to one of the coal company's customers in the southeastern part of Salt Lake City. In attempting to deliver the coal the team was unable to pull the load of coal over the sidewalk, and the teamster then unhitched his team, leaving the wagon tongue to protrude entirely across the sidewalk about a foot above the walk. The tongue was left in that condition, without any sign or warning of any kind, all night. Early the next morning, before daylight, the plaintiff, being wholly ignorant of the condition of the wagon tongue, in delivering the morning papers, while riding on his bicycle, ran against the wagon tongue, and was thrown from his bicycle and was severely

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injured. The coal company unloaded the coal from the wagon some time next day. The plaintiff made the necessary proof concerning his injuries, damages, etc., and rested. Both the ice company and the coal company then interposed separate motions for a nonsuit. The motion of the ice company was granted, while that of the coal company was denied, and the case proceeded to judgment against it. The appeal is from that judgment.

The principal error assigned, in fact the only one we need to specially consider, is that the court erred in denying defendant's motion for a nonsuit, and in submitting the case to the jury on the facts, upon the ground that the driver of the wagon was not the agent or servant of the coal company, but was in fact and in law the agent or servant of the ice company. We need not pause to consider the relationship of the ice company to the transaction in question. It is sufficient for us to know that the ice company was dismissed from the case as hereinbefore stated, and that the coal company cannot legally complain of the court's ruling in dismissing the ice company from the case. The only question, therefore, that concerns us is, what is the relationship of the coal company and the driver of the wagon and how is it related to the transaction in question? Can we say as a matter of law that it should not be held liable for the negligence of the driver in leaving the wagon tongue in the condition stated, and thus endangering the safety of any person who might attempt to pass over the sidewalk in the nighttime? It is not always easy to determine the precise relationship of the parties under circumstances like those in the case at bar. The courts have at times found it difficult to determine which one of the two alleged employers is liable for the negligent acts of commission or omission of a particular employé. Mr. Justice MOODY states the principle which applies to cases like those we have just referred to so clearly and so admirably that we take the liberty of quoting his statement, which is found in the case of *Standard Oil Co. v. Anderson*, 212 U. S. at page 220, 29 Sup. Ct. at page 253 (53 L. Ed. 480). The Justice says:

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"One who employs a servant to do his work is answerable to strangers for the negligent acts or omissions of the servant committed in the course of the service. The plaintiff rests his right to recover upon this rule of law which, though of comparatively modern origin, has come to be elementary. But, however, clear the rule may be, its application to the infinitely varied affairs of life is not always easy, because the facts which place a given case within or without the rule cannot always be ascertained with precision. The servant himself is, of course, liable for the consequences of his own carelessness. But when, as is so frequently the case, an attempt is made to impose upon the master the liability for the consequences, it sometimes becomes necessary to inquire who was the master at the very time of the negligent act or omission. One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation."

The facts and conclusion of the court are so accurately reflected in the third headnote to the case of *Philadelphia & R. C. & I. Co. v. Barrie*, 179 Fed. 50, 102 C. C. A. 618, as to justify the adoption of that headnote as part of this opinion, which we do. The headnote reads as follows:

"Where defendant, a coal dealer, in delivering coal from its yards to customers, hired from another dealer a team and a driver in the latter's general employ, paying a stipulated sum per hour for their services, and having full control and direction of the work and the method of its performance, the driver, while engaged in such work, was a servant of defendant, which was liable for an injury to a third person caused by the driver's negligence in its performance."

The doctrine announced in the Barrie Case is also fully sustained in 1 Labatt, Master and Servant (2d Ed.) sections 52-57, where the author, in referring to the decisions in which the relationship between a servant who by his employer is permitted to work for another person is discussed, approves and adopts the language of Mr. Chief Justice Cockburn in *Rourke v. White Moss Colliery Co.*, L. R. 2 C, P. Div. 205, namely:

"When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to

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whom he is lent, although he remains the general servant of the person who lent him.'"

The author concludes:

"In other words, the servant of A. may, for a particular purpose or on a particular occasion, be the servant of B., though he continues to be the general servant of A. and is paid by him for his work."

To the same effect are *Scribner's Case*, 231 Mass. 132, 120 N. E. 350 and *Moll*, Independent Contractors and Employers Liability, Section 7.

Plaintiff's counsel has also called our attention to a recent article in 89 Central Law Journal, pages 97-103, in which the doctrine is ably discussed, and where a number of cases are cited and distinguished. The writer of the article makes it quite clear that the doctrine quoted from *Labatt* is the one that is supported by the best-considered cases. We desire to express our appreciation to counsel for having directed our attention to the article while the case remained undisposed of.

The following cases also fully sustain the conclusion reached in the *Barrie Case* from which we have quoted: *Kolnitsky v. Matthews*, 64 Misc. Rep. 167, 118 N. Y. Supp. 366, *Weber v. Becker* (Sup.) 136 N. Y. Supp. 119, and *Glover v. Richardson & Elmer Co.*, 64 Wash. 403, 116 Pac. 861. There are a number of cases cited in the foregoing cases, where the same result was reached under similar circumstances, to which we need not specially refer.

The law as laid down in the foregoing cases fully justifies us in sustaining the ruling of the trial court in denying the motion of the coal company for a nonsuit. Counsel for the coal company has however, cited and relies upon the following, among other, cases: *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922; *Foster v. Wadsworth-Howland Co.*, 168 Ill. 514, 48 N. E. 163; *Chicago, etc., Co. v. Campbell*, 116 Ill. App. 322; *Cohen v. Western Elec. Co.*, 50 Misc. Rep. 660, 99 N. Y. Supp. 525; *Quinn v. Complete Elec. Const. Co.* (C. C.) 46 Fed. 506; *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54; *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas.

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1913A, 883; *Ash v. Century Lumber Co.*, 153 Iowa, 523, 133 N. W. 888, 38 L. R. A. (N. S.) 973.

While all of the foregoing cases have features which in some respects are similar to those in the case at bar, yet, upon a close analysis of the cases, it will be found that the case at bar in many respects is distinguishable from those cases, and that the controlling features of this case are like those in the cases we have quoted from above.

Upon the whole record we feel constrained to hold that the district court did not err in denying the motion for a non-suit, and that the case is not one where we can say as a matter of law that the coal company is not responsible for the negligent acts of the driver of the coal wagon in leaving it in the condition he did while in the act of delivering the coal of the coal company; while, upon the other hand, under the law as laid down in the cases we have quoted from, when applied to the facts, the jury could well find that the driver of the wagon was the agent of the coal company, and that it is responsible for his negligence.

Other errors assigned, in view of the record, are not such as require special consideration.

For the reasons stated the judgment should be, and it accordingly is, affirmed, with costs to plaintiff.

CORFMAN, C. J., and WEBER and THURMAN, JJ.,  
concur.

GIDEON, J.

I dissent. Probably a brief review of what I understand the facts to be, as disclosed by the record, will give a better understanding of my views respecting the questions presented on this appeal.

It appears that the Wasatch Coal Company was conducting a retail coal business at Salt Lake City, Utah. At the time of the alleged accident it had no teams of its own with which to deliver coal to its customers. The Independent Ice Company was the owner of teams and wagons, and during the



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summer months was engaged in selling and delivering ice. In the fall of 1917 a contract or agreement was made between the coal company and the ice company whereby the latter undertook, for an agreed sum per ton, to deliver coal for the defendant coal company to its various customers within Salt Lake City. The arrangement seems to have been that whenever the coal company desired teams it would telephone the ice company, and thereupon the ice company would send its teams, together with drivers and wagons, except the beds or boxes, to the office of the coal company, where the driver would receive directions as to the time of delivery, the amount of coal to be delivered, and the addresses to which it should be delivered. If the coal was delivered C. O. D., the drivers collected the money and returned it to the coal company. When the coal was directed to be so delivered, and the customer failed to pay, the driver would return the coal to the yards of the coal company. After the day's work the drivers would return the teams to the stables of the ice company, and would take the teams from there the following day. It also appears that the ice company employed the drivers, paid them an agreed compensation, discharged them at its pleasure, and that the coal company in no way directed or suggested the employment of any one as a driver other than if any particular driver was objectionable notice was usually given to the ice company of that fact and some other driver would be substituted. On or about November 2, 1917, one of the teams of the ice company was delivering coal for the coal company, and, as directed by the manager of that company, attempted to deliver a load of coal at an address given by said company. In attempting to pass from the street over the sidewalk to the residence where the coal was to be delivered the wagon became so mired in the dirt that the team could not pull it over the walk. Thereupon the driver unhitched the team, left the wagon tongue extending partially across the paved sidewalk, placed no lights or guards around it, and left it in that condition overnight. In the early morning following plaintiff ran over the end of the tongue, and was thrown to the pavement, and received the injuries complained of. No

officer or employé of either company, except the driver, had any knowledge of the condition in which the loaded wagon had been left until the following day.

At the conclusion of plaintiff's testimony the court granted a motion for nonsuit made by the defendant ice company. The jury returned a verdict against the coal company. That company appeals. It failed, however, to serve notice of appeal upon its codefendant, the ice company. The respondent, plaintiff below, now moves to dismiss the appeal, and urges such failure to serve notice of appeal upon the ice company as grounds therefor. That motion, in my judgment, should be granted.

The complaint charges the defendants jointly with the negligence that caused the injury. Both defendants denied the negligence as well as liability. The record in this case clearly shows that either the defendant ice company or the defendant coal company is responsible for the negligence that caused the injury. There can, in my judgment, be no question about that. The tongue of the wagon was negligently left by the driver so as to cause the injury. At that particular time the driver sustained such relationship to either the ice company or the coal company as would make one of such defendants liable for his negligent acts. There is nothing in the record tending to show that both defendants sustained such relationship to the driver as to make them both either individually or jointly liable. Admittedly the driver was in the general employ of the ice company. If it should be determined by this court that the coal company, appellant, is not liable, it would indisputably follow that the ice company would be answerable for the consequences of the driver's negligent act. Of course, the driver would be personally liable. The defendant ice company succeeded in convincing the trial court that it was not liable. That the court determined as a legal proposition upon granting the ice company's motion for nonsuit. Such was not a trial or final determination upon the merits of the ice company's liability. *Williams v. Nelson*, 45 Utah, 255, 145 Pac. 39. Under the provisions of Comp. Laws Utah 1917, section 6484, the plaintiff could within the time

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specified in that section, institute another action against the ice company notwithstanding the granting of the nonsuit in this action. The presumption is always indulged, and rightly so, that a judgment debtor is solvent and will pay any judgment regularly rendered and entered against him. The affirmance of the judgment against the coal company and the payment of the same would be a complete defense to any action the plaintiff might thereafter prosecute against the ice company for the alleged negligent act. Notwithstanding the ruling of the district court that the ice company is not liable, and notwithstanding that if this court should affirm the judgment against the coal company and that judgment should be paid, as the ice company has a right to assume that it will be, and notwithstanding that under the admitted facts in this case that if the coal company is not liable the ice company is and can be subjected to a new action, the majority opinion is that the ice company has no interest in the appeal and is in no sense an adverse party. Such a conclusion, in my judgment, contravenes the principle or rule announced by this court in *Griffin v. S. P. Co.*, 31 Utah, 299, 87 Pac. 1092, where the court, speaking through Chief Justice McCarty, says:

"We are of the opinion, and so hold, that unless it affirmatively appears from the record that a party to an action would not be injuriously affected by a reversal of the case, such party must be served with notice in case an appeal is taken, otherwise this court can acquire no jurisdiction over the action except to dismiss the appeal, and thereby affirm the judgment appealed from."

In *Langton Lime & Cement Co. v. Peery*, 48 Utah, at page 115, 159 Pac. at page 50, the test for the determination of who are adverse parties is stated by Justice Frick in the following language:

"This court, by an unbroken line of decisions, has held that all the parties to an action who may be adversely affected by a modification or reversal of the judgment are adverse parties under our statute, and must be made parties to the appeal either as appellants or respondents."

Naturally the converse of that proposition would be true, as pointed out in the majority opinion in the quotation taken from 48 Utah, at page 112, 159 Pac. 49.

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The facts in the *Griffin Case*, supra, were that the defendant railroad company and one Austin were jointly charged in the complaint with the negligence that caused the death of plaintiff's intestate. Austin was served with summons, but failed to plead or further appear in the action, and default was entered against him. The railroad company answered, and a general verdict was returned by the jury against both defendants. The railroad company appealed, but failed to serve notice upon its codefendant. This court dismissed the appeal, and assigned as one of the reasons for so doing that a reversal might injuriously affect Austin, and this court could not indulge the presumption that it would not. In the present case both defendants are jointly charged with the commission of the negligent act. During the trial the ice company had judgment in its favor by the court granting its motion for nonsuit. I confess my inability to follow the reasoning whereby the conclusion is reached that one defendant jointly charged with another, but who has judgment entered against him, is any more an interested or a necessary party than one who is also jointly charged with another with the negligent act in question, but who is successful in having a judgment entered and rendered in his favor, or that the latter thereby ceases to be an adverse party to an appeal from the judgment. Especially does that reasoning to me seem fallacious in view of the fact that under the provisions of our Code, and under the admitted facts in this record, such successful defendant would be liable to be sued in a new action for the same negligent act. In my judgment the latter is an adverse party, and is interested in having the judgment of the lower court affirmed. Such, in fact, was the holding of the Supreme Court of Oklahoma under a statute similar to ours, in *Humphrey et al. v. Hunt*, 9 Okl. 196, 59 Pac. 971. In that case Maggie Hunt brought action against Lewis Humphrey and eight others, including one Fred Belt, to recover damages for the death of her husband. At the trial a verdict was had and judgment entered against six of the defendants, and a verdict and judgment in favor of Belt and against plaintiff. The defendants against whom judgment had been en-

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tered appealed, but did not serve notice of appeal upon Belt. The appeal was dismissed on the ground that appellants had failed to serve notice upon all the adverse parties. The court assigns as a reason for such ruling that Belt was entitled to be made a party so that he could present to the appellate court any reasons he might have why the judgment should be affirmed. No sound reason, in my judgment, is given in the prevailing opinion, nor in the authorities cited therein, why the conclusion of the Oklahoma court should not be controlling here.

A like ruling was made by the Supreme Court of California in *Bullock v. Taylor*, 112 Cal. 147, 44 Pac. 457. True, that action was for breach of contract against three defendants claimed to have executed the contract as partners. Nonsuit was granted as to two of the defendants and judgment was against the other. The defendant against whom judgment was rendered served notice of appeal on the plaintiff only. On the appeal one of the errors assigned was the granting of the motion for nonsuit of appellant's codefendants. The appellate court dismissed the appeal, holding that jurisdiction had not been acquired, and that the defendants who had been taken out of the case by granting the nonsuit would be adversely affected by a reversal of the judgment. I can see no difference in principle between an action of that character and the one now under consideration.

In the present case the appellant's third assignment of error is as follows:

"The court erred in granting the motion of the defendant Independence Ice Company for a nonsuit for the reason that the evidence shows that, as between the defendants Independent Ice Company and the Wasatch Coal Company, the teamster, Ed. Wesler, at the time of the accident complained of, was the servant or agent of the said Independent Ice Company and not of the Wasatch Coal Company; and for the further reason that, if there was any conflict in the evidence as to whether said teamster was at the time of the accident the servant or agent of either of said defendants, that question should have been submitted to the jury."

If there ever was any question as to the Independent Ice Company being an adverse party, the foregoing assignment

would seem to be sufficient answer to the contention. At least it is conclusive that the appellant considered that the court erred in granting the ice company's motion for nonsuit, and he assigns it as a proper subject for review by this court.

It is insisted that the ice company is in no worse condition by a reversal of this judgment than it would have been if it had never been made a party to the action. Granting that that may be true, nevertheless the ice company was made a party, and as such I think is entitled to have its rights determined, if possible, in this suit, and not be harrassed by new proceedings. It is the admitted policy and the duty of the courts to so determine the rights of parties brought into litigation as to avoid the expense and delay of numerous actions.

I am making no defense or argument in support of the ruling or principal announced in the *Griffin Case*, nor of the statute upon which that rule is predicated. The Constitution of this state guarantees the right of appeal to this court from judgment of the district courts to all litigants, and the Legislature might well have, in my judgment, in prescribing the method of exercising that constitutional right, made such provision that, when a party appealing has neglected to serve all adverse parties, such adverse parties could thereafter, by order of court, be brought into this court, upon it being made to appear that such parties are necessary to the jurisdiction of this court. But so long as the rule or principle announced in the *Griffin Case* is to stand as the established law or rule of procedure in that class of cases, I see no reason why a different rule should be laid down in cases like the one under consideration. In my judgment, there is no difference in principle.

I think the motion to dismiss the appeal should be granted.

Passing now to a consideration of the merits of the case. I am unable to concur in the affirmance of the judgment. Accepting the general principle expressed in the quotation from 212 U. S. in the prevailing opinion as the true rule to govern in determining when one who is in the general employment of another may, by arrangement made between such employer

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and a third person, cease to be the employé of the general employer and for the time being become the servant of the third person, I cannot, in the application of that principle to the facts in the instant case, concur in the conclusions reached. In the application of that general principle announced in the case referred to, after discussing the test for determining whether the relationship of master and servant existed between the servant and the general employer, or between the servant and the one to whom he had been let or hired at the time of the injury, the Supreme Court of the United States concluded the discussion thus:

"To determine whether a given case falls within the one class or the other, we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary co-operation, where the work furnished is part of a larger undertaking."

The facts in that case were that the plaintiff was employed by a master stevedore, who was under contract to load a ship belonging to the defendant with oil. The plaintiff was working within the hold of the ship, where he was injured without fault on his part by being struck by a draft or load of cases containing oil which was unexpectedly lowered into the hold. The motive power was furnished by a steam winch or drum, and the hoisting and lowering were accomplished by means of a tackle, guy rope, and hoisting rope. The tackle and ropes were furnished and rigged by the stevedore, and the winch and drum were owned by the defendant and placed on its dock, some fifty feet distant from the hatch. All the work of loading was done by the employés of the stevedore, except the operation of the winch, which was done by a winchman in the general employ of the defendant. It appears that the operator of the winch received signals from the employés of the stevedore when to raise and lower the tanks containing oil, and that he neglected to observe or follow such signals, thereby lowering the tanks out of time and causing the injury. Applying the general principle stated in the quotation

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Badertscher v. Independent Ice Co. et al., 55 Utah 100.

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to the facts of that case, the Supreme Court determined that such facts did not warrant the conclusion that the relationship of master and servant did not exist between the defendant and the operator of the winch. It is pointed out that the winchman was under the general employment of the defendant, who selected him, paid his wages, and had the right to discharge him for incompetency, misconduct, or for any other reason; that, before such legal relationship of master and servant could be terminated, it was necessary that a new like relationship be created between the winchman and the stevedore.

The facts presented by the record in the case at bar, as I view them, show that the driver, at the particular time of leaving the tongue of the wagon so as to cause the injury, was doing the work of the ice company. It will be remembered that the contract between the ice company and the coal company was that the ice company should deliver coal with its teams and wagons at an agreed price. Of necessity, in the performance of that work, the amount of coal, as well as where and to whom it should be delivered, must be determined and directed by the officers of the coal company, otherwise the ice company would have no information or direction how to carry out and complete its part of the contract. The method or manner of delivery seems to have been under the control of the ice company or its employés.

The Supreme Court of Massachusetts, in *Driscoll v. Towle*, 181 Mass. at page 419, 63 N. E. at page 923, in considering a case where the facts are almost identical with the facts here, and in discussing this particular question said:

"In case like the present there is a general consensus of authority that, although a driver may be ordered by those who have dealt with his master to go to this place or that, to take this or that burden, to hurry or to take his time, nevertheless in respect to the manner of his driving and the control of his horse he remains subject to no orders but those of the man who pays him. Therefore he can make no one else liable if he negligently runs a person down in the street."

There is nothing in the record to show that the officers of the coal company in any way controlled, directed, or sug-



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gested to the driver employed by the ice company the method to be employed in delivering the coal, or how or in what manner the premises of the person to whom the coal was to be delivered should be entered.

The general principle quoted from the Supreme Court of the United States is made the basis of practically all decisions rendered by the courts of this country since its announcement. In the application of that general principle I have found no authority, where the facts are similar to the facts here, where it has been held that the driver or the party causing the injury was the employé of the one to whom he was let or hired, unless it be the case of *Philadelphia & R. Coal & Iron Co. v. Barrie*, 179 Fed. 50, 102 C. C. A. 618, Circuit Judge Sanborn, in a concurring opinion in that case, said:

"The question in this case is whether the Coal & Iron Company or Martin was the master of the driver, McQuistran, in the latter's performance of the specific act of protecting pedestrians from stepping into the coal hole in the sidewalk while he was unloading the coal into it. When a master who has and exercises the power to hire and discharge his servant lets him and a team to a hirer, to go where and do such known work as the hirer directs, the legal presumption is that, although the hirer directs the servant where to go and what to carry or haul or do, the driver still remains subject to the control of his general employer in the method of his performance of the work to which the hirer assigns him, and the hirer is not liable, in the absence of an agreement to the contrary for the negligence of the servant in the method or manner of his performance of his service. (Citing numerous cases.)

Judge Sanborn, however, concurred in the order holding the defendant liable on the ground that the defendant's local manager testified as follows:

"Q. And the method of delivery is under your orders? A. Yes, sir. Q. Place, the time, the amount, and all, is under your orders? A. I have said so two or three times."

As I have pointed out, there is nothing in the record tending to indicate that the method of delivering the coal in the case now under consideration was under the control of the coal company. To that extent, at least, the facts here differ from the facts in the case reported in 179 Fed. There is practically no dispute as to what the facts are in this case. There

was, therefore, no question to be submitted to the jury, as some of the cases hold should be done, as to whose employé the driver was at the time of the negligent act committed by him. It thus became a question of law, under the admitted or proven facts, for the court to determine whose servant the driver was at that particular time. The following cases, in my judgment, support what I here contend for: *Foster v. Wadsworth-Howland Co.*, 168 Ill. 514, 48 N. E. 163; *Quinn v. Complete Elec. Const. Co.* (C. C.) 46 Fed. 506; *Keltogg v. Church Charity Foundation*, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883; *Burns v. Michigan Paint Co.*, 152 Mich. 613, 116 N. W. 182, 16 L. R. A. (N. S.) 816; *Singer v. McDermott*, 30 Misc. Rep. 738, 62 N. Y. Supp. 1086. See, also, 1 Labatt, Mast. & Serv. (2d Ed.) section 54.

A careful consideration of the facts of this case and the application of the law thereto, as I understand the law, convinces me that at the time of the act complained of the driver was the servant of the ice company, and that therefore the coal company should not be held liable in this case.

For the foregoing reasons I dissent from the affirmance of the judgment, unless such affirmance shall be based upon the dismissal of the appeal.

ON APPLICATION FOR REHEARING.

FRICK, J.

Counsel for appellant has filed a petition for a rehearing. He does not contend that we have overlooked or omitted anything, but he most urgently insists that our conclusion is contrary to law. When court and counsel disagree respecting the law that controls a case, counsel, as a matter of course, always insist that their views should have prevailed. For that reason, if for no other, nothing is ordinarily gained by a reconsideration of the legal propositions already decided. In this instance, however, counsel in his petition for a rehearing vigorously insists that the cases we have cited in support of

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our conclusion are not applicable to the facts of this case. We doubt not counsel for appellant has convinced himself that such is the case, and is therefore justified in making the assertion. The majority of the court, however, is unable to arrive at such a conclusion. Without attempting to restate the facts, it must suffice to say that there is and can be no doubt whatever that the driver of the coal wagon in delivering the coal was under the sole direction and control of the coal company. He took the team and running gears of a wagon belonging to the ice company to the coal yard of the coal company for the express purpose of delivering the coal to such places and to such persons as he might be directed by the latter company. If that company directed the driver to deliver coal to A., the ice company had no authority or power to direct him to deliver the coal to B., or to C., or to any one else. In delivering the load of coal in question the driver was therefore under the immediate control and direction of the coal company, precisely the same as though he had been originally employed by it for that purpose. For the purpose of that transaction the driver was the agent and employé of the coal company, although in fact and in law he may have remained the general servant of the ice company. The test respecting responsibility is, by which company was he employed and for which one was he acting in delivering the coal in question? Manifestly, for that purpose, he was employed by, and was acting for, the coal company, and not for the ice company. That being so, the coal company, and not the ice company, must be held responsible for his negligent act which caused the injury. Such is clearly the effect of the decisions we have cited in the opinion. We are still clearly of the opinion that our former conclusion is right, and it is therefore adhered to.

The petition for a rehearing is denied.

CORFMAN, C. J., and WEBER and THURMAN, JJ.,  
concur.

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Bd. of Ed. of Davis Co. School Dist. v. Smith et al., 55 Utah 124.

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BOARD OF EDUCATION OF DAVIS COUNTY SCHOOL  
DIST. v. SMITH et al.

No. 3389. Decided September 8, 1919. (184 Pac. 160.)

Application by the Board of Education of Davis County School District, a municipal corporation, for writ of mandate to require D. F. Smith and others, as County Commissioners of Davis County and Seth C. Jones and others, as officers of said county, to levy taxes in accordance with a certified estimate of the school board.

## WRIT OF MANDATE ISSUED.

*Carlson & Carlson* of Salt Lake City, for plaintiff.

WEBER, J.

The board of education of Davis county school district has filed its application in this court for a writ of mandate to require defendants to levy taxes in accordance with the certified statement and estimate of the school board, and to make such a levy as will raise \$148,150, less \$57,150 that will be received from the state and state high school funds.

The assessed valuation of Davis county for 1919 is approximately \$17,216,020. The defendants refused to levy or fix a tax on the property in the school district in excess of four and seven-tenths mills for the support and maintenance of schools in said district and the purchase of sites and erection of buildings for the school year beginning July 1, 1919. It is alleged by plaintiff, and is not denied, that the levy of four and seven-tenths mills would not produce sufficient revenue for the needs of the school district, and that the amount certified by the school board is necessary in order to maintain the schools during a period of nine months, and that it is estimated that a levy of six mills is required for the support and maintenance of the schools and the purchase of school sites and erection of buildings in the district.

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Prayer for Mandamus. Writ Issued.

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Upon authority of *Board of Education, etc., v. Stillman et al.*, 55 Utah, 125, 184 Pac. 159, *Board of Education v. Hunter*, 48 Utah, 373, 159 Pac. 1019, and *Board v. Hanchett*, 50 Utah, 289, 167 Pac. 687, the prayer of plaintiff's complaint is granted, and the peremptory writ of mandate applied for is ordered to be issued. Plaintiff to recover costs.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

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BOARD OF EDUCATION OF GRANITE SCHOOL DIST.  
v. STILLMAN et al.

No. 3384. Decided September 8, 1919. (184 Pac. 159.)

**SCHOOLS AND SCHOOL DISTRICTS—TAX LEVY LIMITED TO SEVEN MILLS, INCLUDING SCHOOL SITES.** Tax levies for county school districts of the first class should be made without regard to the proviso of Comp. Laws 1917, section 4624, which is void for making discriminatory classifications of property valuation in regulating maximum assessment for any year, but should be made in accordance with Laws 1911, chapter 135, amending Comp. Laws 1907; section 1891x27, limiting the assessment to five and one-half mills, with an additional one and one-half mills exclusively for purchase of school sites and erection of buildings.<sup>1</sup>

Application by the Board of Education of Granite School District for a writ of mandate to compel the defendants Charles F. Stillman and others, as the Board of County Commissioners of Salt Lake County, and J. E. Clark and others, as county officers to levy a tax assessment of approximately seven and two-tenths mills on a dollar of the assessed valuation of such district.

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<sup>1</sup> *Board of Education v. Hunter*, 48 Utah, 373, 159 Pac. 1019; *Board of Education v. Hanchett*, 50 Utah, 289, 167 Pac. 686.

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Board of Ed. of Granite School Dist. v. Stillman et al., 55 Utah 125.

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## WRIT OF MANDATE ISSUED.

*Carlson & Carlson* of Salt Lake City, for plaintiff.

*Richard Hartley*, Co. Atty., and *D. A. Skeen*, Asst. Co. Atty., both of Salt Lake City, for defendants.

CORFMAN, C. J.

The plaintiff board of education of Granite school district filed its application in this court for a writ of mandate to issue against the defendants, Charles F. Stillman, Joseph Lindsay, and W. B. Hughes, as the board of commissioners of Salt Lake county, and J. E. Clark, as county clerk, James E. Lynch, as assessor, W. W. Barton, as treasurer, and M. C. Iverson, as auditor, of said county, to require them to levy taxes in accordance with a statement and estimate made by the plaintiff on April 28, 1919, for the support and maintenance of the schools in their charge for the year 1919, under the provisions of section 4624 (1891x27) of the Compiled Laws of Utah of 1917. According to the allegations of plaintiff's petition the estimate of the plaintiff of the amount necessary to be raised was as follows: For the support and maintenance of schools, \$286,600; for the purchase of school sites and the erection of buildings, \$62,500; for the payment of interest on bonds, \$29,460; and for a sinking fund for the payment and redemption of bonds, \$12,760—the aggregate amount being \$391,320, which sum, less the sum of \$113,500 to be received from the state high school fund and the state district school fund and the state land rental and interest fund, was to be raised by levy upon the assessed valuation of the property of said school district.

The defendants refused to levy a tax on the property of said Granite school district in excess of four and two-tenths mills, which levy it is alleged will not raise an amount sufficient for the purposes mentioned in the estimate. Said Granite school district is a county school district of Salt Lake county of the first class, and has an assessed property valua-

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Prayer for Mandamus. Writ Issued.

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tion for the year 1919 of approximately \$38,623,740, thus requiring an assessment of approximately seven and two-tenths mills on the dollar of the assessed valuation to meet said estimate and statement of the plaintiff.

An alternative writ was issued on plaintiff's petition, requiring the defendants to show cause on a day certain why they should not make a levy of seven and two-tenths mills to meet the requirement of plaintiff's estimate and statement. The defendants appeared and filed a general demurrer to plaintiff's petition and the same has been argued and submitted.

Section 4624 (1891x27) Comp. Laws Utah 1917, provides:

"The board of education shall, on or before the 1st day of May of each year, prepare a statement and estimate of the amount necessary for the support and maintenance of the schools under its charge for the school year commencing on the 1st day of July next thereafter, and for the purchase of school sites and the erection of school buildings, also the amount necessary to pay the interest accruing during such year, and not included in any prior estimate, on bonds issued by the said board; also the amount of sinking funds necessary to be collected during such year for the payment and redemption of said bonds; and shall forthwith cause the same to be certified by the president and clerk of said board to the officers charged with the assessment and collection of taxes for general county purposes in the county in which the district is situated, and such officers, after having extended the valuation of property on the assessment rolls, shall levy such per cent. as shall, as nearly as may be, raise the amount required by the board: \* \* \* Provided, that the tax on all taxable property of the said district for the support and maintenance of schools, the purchase of school sites, and erection of school buildings shall not exceed in any one year, in any district whose assessed valuation is \$20,000,000 or more, four and two-tenths mills on the dollar; and in any district whose assessed valuation is more than \$15,000,000 and less than \$20,000,000, four and seven-tenths mills on the dollar; in any district whose assessed valuation is more than \$10,000,000 and less than \$15,000,000, five and two-tenths mills on the dollar; and in any district whose assessed valuation is more than \$5,000,000 and less than \$10,000,000, five and 5-tenths mills; and in any district whose assessed valuation is less than \$5,000,000, six mills on the dollars."

It will therefore be seen that the question raised is whether or not, in view of the provisions of the foregoing statute, an

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assessment of more than four and two-tenths mills on the dollar may legally be assessed upon the taxable property of Granite school district, having an assessed valuation of \$38,-623,740, for the support and maintenance of schools, the purchase of school sites, and erection of school buildings for the district.

Precisely the same question as now raised was involved in the cases of *Board of Education v. Hunter*, 48 Utah, 373, 159 Pac. 1019, and *Board of Education v. Hanchett*, 50 Utah, 289, 167 Pac. 686, in which this court held that as a basis for the determination of a tax levy the discriminatory classifications of property values made under similar statutes, viz. section 1891x27 of chapter III, Laws of Utah 1915, as amendatory to section 1891x27 of chapter 78, Laws of Utah 1915 (passed by the same Legislature, but providing they should become effective on different dates), as amendatory to section 1891x27 of chapter 96, Laws of Utah 1913, as amendatory to section 1891x27 of chapter 135, Laws of Utah, 1911 (in which latter section the objectionable classification is not contained), are illegal. It therefore appears, and the decisions of this court both in the *Hunter* and *Hanchett Cases*,<sup>\*</sup>supra, are to the effect, and therefore controlling here, that the tax levies for county school districts of the first class should be made without regard to the objectionable proviso above quoted, found in section 4624, Comp. Laws Utah 1917. To do so it necessarily follows that such assessments, in order to be legally made, should be in accordance with section 1891x27, chapter 135, Laws of Utah 1911, which provides:

"That the tax for the support and maintenance of such school shall not exceed in any one year five and one-half mills on the dollar upon all taxable property of said district, and shall not exceed one and one-half mills additional on the dollar in one year, to be used exclusively for the purchase of school sites and erection of school buildings, but in case any funds collected for support or maintenance are not used within the school year for which they were raised, they may be used for building purposes."

It is therefore ordered that the demurrer to plaintiff's petition be overruled, and that the peremptory writ of mandate applied for be issued.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.



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Appeal from Fifth District.

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## LYNCH v. JACOBSEN.

No. 3386. Decided October 9, 1919. (184 Pac. 929.)

1. **CONSTITUTIONAL LAW—PROVISION FOR DOUBLE LIABILITY OF BANK STOCK IS SELF-EXECUTING.** A constitutional provision imposing double liability on bank stockholders is self-executing. (Page 135.)
2. **BANKS AND BANKING—ENFORCEMENT OF DOUBLE LIABILITY OF STOCKHOLDERS.** Where Constitution provides double liability for bank stockholders in favor of creditors, but does not fix how it shall be enforced, the bank's creditors may enforce the liability in an ordinary action, either at law or in equity, though it seems that actions in equity have the preference under such circumstances. (Page 136.)
3. **BANKS AND BANKING—ENFORCEMENT OF DOUBLE LIABILITY OF STOCKHOLDERS.** Where constitutional provision imposing double liability on stockholders of banks fails to determine by whom the liability for benefit of creditors may be enforced, the Legislature may at any time determine who may sue the stockholders and what the nature of the proceedings shall be. (Page 136.)
4. **BANKS AND BANKING—RECEIVER MAY ENFORCE DOUBLE LIABILITY OF STOCKHOLDERS.** Where Constitution imposes a double liability for benefit of creditors on bank stockholders, a receiver, appointed to take charge of an insolvent bank's assets and wind up its affairs, may, under section 34, chapter 25 Laws, Utah 1911, sue to enforce the liability. (Page 136.)
5. **BANKS AND BANKING—DETERMINATION OF DOUBLE LIABILITY OF SHAREHOLDERS.** The order or judgment of the court declaring a bank insolvent and finding that it is necessary to enforce the stockholders' additional liability to pay the bank's debts, in the absence of fraud or collusion, is conclusive upon stockholders, and they may not assail it save in a direct proceeding. (Page 136.)
6. **CONSTITUTIONAL LAW—CHANGE OF MODE OF ENFORCEMENT OF DOUBLE LIABILITY OF STOCKHOLDERS.** Where state Constitution imposes a double liability on bank stockholders, the method of enforcing the liability may be changed by the Legislature, provided such change does not affect or enlarge the liability of the stockholders, and the Constitution does not itself provide a method of procedure. (Page 137.)
7. **BANKS AND BANKING—ENFORCEMENT OF STOCKHOLDERS' DOUBLE LIABILITY.** It is not essential to the enforcement of double liability imposed by law upon bank stockholders that all of the bank's assets be first exhausted, where it is apparent that the bank is insolvent. (Page 137.)

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8. **CONSTITUTIONAL LAW—SELF-EXECUTING PROVISIONS FIXING LIABILITY OF BANK STOCKHOLDERS.** Where the Constitution imposes a liability without prescribing a remedy, the provision is a mere limitation on the power of the Legislature which may fix a remedy, but until the Legislature acts the courts will, the constitutional provision being self-executing, enforce the liability in accordance with some known remedy.<sup>1</sup> (Page 138.)
9. **CONSTITUTIONAL LAW—ENFORCEMENT OF DOUBLE LIABILITY ON BANK STOCK.** The right to enforce the double liability imposed by Const. art. 12, section 18, on bank stockholders for the benefit of creditors, is not given by the Constitution to creditors; and, while not technically an asset of the corporation, it was competent for the Legislature to provide as it did by Laws 1911, chapter 25, section 34, for enforcement of such liability by a receiver appointed on insolvency of a bank. (Page 139.)
10. **BANKS AND BANKING—RECEIVER MAY ENFORCE STOCKHOLDERS' LIABILITY.** Under Laws 1911, chapter 25, section 34, providing that a receiver, if appointed for a bank, shall, under direction of the court, take possession of the assets of every description, and may, if necessary to pay the debts, enforce all the individual liabilities of stockholders, a receiver is not limited to the general assets, but may, under order of court, enforce the stockholders' liability. (Page 144.)
11. **CONSTITUTIONAL LAW—STATUTES HELD VALID UNLESS CLEARLY UNCONSTITUTIONAL.** A legislative act cannot be stricken down on the ground that it is unconstitutional unless it is clearly and palpably so.<sup>2</sup> (Page 144.)
12. **STATUTES—TITLE OF ACT AUTHORIZING RECEIVER TO ENFORCE DOUBLE LIABILITY ON BANK STOCK.** The title of the Act (Laws 1911, chapter 25) which in section 34 authorizes a receiver of an insolvent bank to enforce the double liability of stockholders, held sufficient to include that provision. (Page 144.)
13. **STATUTES—TITLE OF ACT AUTHORIZING RECEIVER TO ENFORCE DOUBLE LIABILITY ON BANK STOCK.** The provisions authorizing a receiver of an insolvent bank to enforce the double liability of stockholders, found in section 34 of the General Banking Act, is not a separate and distinct subject from the general act. (Page 145.)
14. **BANKS AND BANKING —COMPLAINT IN ACTION ON DOUBLE LIA-**

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<sup>1</sup> *Steinke v. Loofbourow*, 17 Utah, 252, 54 Pac. 120; *McLaughlin v. Kimball*, 20 Utah, 254, 58 Pac. 685.

<sup>2</sup> *Marionaux v. Cutler*, 32 Utah, 475, 91 Pac. 355; *Edler v. Edwards*, 34 Utah, 13, 95 Pac. 367; *State v. Candland*, 36 Utah, 406, 104 Pac. 255; *Salt Lake City v. Wilson*, 46 Utah, 60, 148 Pac. 1104.

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**BILITY OF SHAREHOLDERS.** The allegations of a complaint by a receiver of an insolvent bank seeking to enforce the double liability of stockholders, that the bank was hopelessly insolvent, and that its assets were insufficient to pay its debts, and that it was necessary to collect the full amount of the statutory stockholders' liability, sufficiently show the necessity of enforcing stockholders' liability. (Page 146.)

15. **ACTION—ABOLITION OF FORMS OF ACTION.** While the Constitution abolished forms of action, there are still equitable as contradistinguished from legal rights and remedies, but the rights of a litigant depend entirely on the nature or character of the facts and the law applicable thereto. (Page 149.)
16. **BANKS AND BANKING—ENFORCEMENT OF STOCKHOLDERS' LIABILITY.** Receiver of insolvent bank who finds it necessary to enforce stockholders' double liability may sue as many of the stockholders in one and the same action as may be most convenient, indeed, if he wish, he may sue all stockholders in a single action; and for the same reason a stockholder sued separately may, where the rights of others would not be prejudiced, have his case heard in connection with cases against other stockholders. (Page 150.)

Appeal from District Court, Fifth District, Juab County;  
*Geo. Christenson*, Judge.

Action by Stephen H. Lynch, as receiver, against A. P. Jacobsen. From a judgment for defendant, plaintiff appeals.

REVERSED and REMANDED, with directions.

*Cheney, Jensen & Holman*, of Salt Lake City, for appellant.

*Thos. H. Burton*, of Nephi, for respondent.

*A. R. Barnes, James Ingebretson and M. E. Wilson*, all of Salt Lake City, for other stockholders of Merchants' Bank not parties to this action.

FRICK, J.

This action was commenced in the district court of Juab county by the plaintiff, as receiver of the Merchants' Bank of

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Salt Lake City, against the defendant as a stockholder of said bank, to recover from him the additional liability which is imposed under the provision of the Constitution of this state, to which reference will hereinafter be made. After the case had been submitted by the plaintiff and defendant, several attorneys, who represent other stockholders in actions now pending in the district court of Salt Lake county, applied for and were granted leave to file briefs and arguments in support of the contentions advanced by the defendant in this action. The briefs and arguments filed by those attorneys have been considered by the court in connection with the arguments presented by counsel who represent the parties in this case, and hereinafter we shall only refer to the objections urged by counsel without referring to the counsel making them.

The plaintiff, in his complaint, in substance, alleged: That in a certain proceeding he was, by the district court of Salt Lake county, duly appointed receiver of the Merchants' Bank. That said bank was organized pursuant to the laws of Utah about July 1, 1908, with a capital stock of \$250,000, divided into 2,500 shares of the par value of \$100 each, and that all of said stock was issued and outstanding, and that the defendant is the owner of five of said shares. That "at the time of the appointment of said receiver and prior thereto the said bank was hopelessly insolvent, and its assets were and are insufficient to pay its debts and liabilities, and in order to pay the same it is necessary to collect the full and entire amount of the statutory stockholders' liability provided by chapter 25, Session Laws of Utah 1911, and on or about the 2d day of December, 1918, in due course of administration and upon petition of said receiver duly made, served, and filed in the said receivership proceedings, and upon hearing thereon regularly noticed and had, and evidence duly presented, the said • • • district court, being fully advised in the premises and satisfied of the propriety and the necessity therefor, duly made and entered its order as follows: 'That the necessity for collecting the full amount of the statutory stockholders' liability fully appearing, Stephen H. Lynch, as receiver in the above-entitled cause, is hereby authorized and

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directed to notify the stockholders of the Merchants' Bank that the full amount of their statutory stockholders' liability is now due and payable to him as such receiver, and that, unless same is paid within ten days after notice, suit will be instituted by said receiver to enforce collection of the same, and said receiver is further authorized and directed to institute and prosecute such suits pursuant to the terms of said notice as may be necessary and appropriate, whether in the state of Utah or elsewhere, and to incur such expense and employ such counsel as may be necessary and expedient.' That the plaintiff brings and prosecutes this action pursuant to the said order and authorization and in the discharge of his duties as receiver, as provided in chapter 25, Session Laws of Utah 1911.'" That the plaintiff had duly notified the defendant that the full amount of his additional liability was due and payable, etc. That the defendant had failed to pay, and that the whole amount of his additional liability, to wit, the sum of \$500, is due, for which amount he prayed judgment.

To this complaint the defendant demurred: (1) That the facts stated do not constitute a cause of action against the defendant; (2) that the complaint is uncertain and ambiguous (stating various particulars wherein it is so); (3) that the plaintiff has not legal capacity to sue, for the reason, among others, that the right of action is in the creditors of the bank and not in plaintiff as receiver; (4) that there is a defect of parties, in that the other stockholders are necessary parties to the action and are not made so; and (5) that the act authorizing the receiver to maintain an action to enforce the stockholders' additional liability is unconstitutional and therefore void for the reasons stated in the demurrer, and which will hereinafter more specifically be referred to

The district court sustained the special demurrer, upon the sole ground, however, that the act authorizing the receiver to sue the stockholders and recover from them the additional liability is void because the stockholders are liable to the creditors of the bank only for the additional liability imposed by the Constitution.

The plaintiff elected to stand upon his complaint, and the

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district court entered judgment dismissing the action, from which order plaintiff appeals, assigning the ruling of the court before referred to as erroneous upon various grounds.

We remark that, in view that the sufficiency of the complaint is attacked generally, and as counsel for both parties have requested it, we shall dispose of all the legal questions that are necessarily raised by the demurrer. We deem it more convenient, however, to consider the constitutional ground of the demurrer first.

Our Constitution, art. 12, section 18, provides:

"The stockholders in every corporation, and joint-stock association for banking purposes, in addition to the amount of capital stock subscribed and fully paid by them shall be individually responsible for an additional amount equal to the amount of their stock in such corporation for all its debts and liabilities of every kind."

The foregoing constitutional provision was incorporated into the Revised Statutes of 1898, as section 382 of that revision, in the exact language as it was adopted in the Constitution except that in the last line the word "its" is omitted from the statute. Section 382 was subsequently carried forward into Compiled Laws Utah 1907, in the precise language as it is copied into the Revised Statutes of 1898. In the Revised Statutes of 1898, in section 390, it was also provided:

"The secretary of state, upon becoming satisfied that any bank has become insolvent, or that its capital has become and is permitted to remain impaired, or that it has violated any provision of law, may, through the attorney general, apply to the district court, or a judge thereof, for the appointment of a receiver to take charge of and wind up the business of such bank."

That section was also carried forward into Compiled Laws Utah 1907.

It will be observed that nothing was said, either in the section as found in the Revised Statutes of 1898 or in Compiled Laws Utah, 1907, respecting the receiver's right to enforce the stockholders' additional liability.

The law remained in that condition until March, 1911, at which time the Legislature passed chapter 25, Laws Utah 1911, in which section 382 aforesaid is again copied in the

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language of the Constitution, with the exception of the word "its" as before stated. That act (section 34) also provides for the appointment of a receiver in case a bank becomes insolvent or in case its capital is so impaired that it cannot comply with the conditions imposed by the act. Section 34 aforesaid, among other things, provides:

"The receiver, if any be appointed, shall, under the direction of the court, take possession of the books, records and assets of every description of such bank, collect all debts, dues and claims belonging to it, sell or compound all bad or doubtful assets, and sell all the real and personal property of such bank, on such terms as the court shall direct, *and may, if necessary to pay the debts of such bank, enforce all individual liabilities of the stockholders*, and shall make a report to the bank commissioner of all his acts and proceedings." (Italics ours.)

The italicized portion is in the language of the federal act authorizing the Comptroller of the Currency to proceed to recover the stockholders' additional liability. The same language is also used in many of the laws of the different states to which reference is made in the cases hereinafter cited.

We remark that neither in the constitutional provision nor in anything that is said in the Revised Statutes of Utah of 1898, nor in Compiled Laws Utah 1907, nor in the act of 1911, is there any intimation whatever with respect to what the nature of the proceedings shall be. Indeed, until chapter 25, *supra*, was passed in 1911 nothing had been said in either the Constitution or the statutes as to who should enforce the stockholders' additional liability. In chapter 25 it is, however, expressly provided that the receiver may do so

Before proceeding to a consideration of the various contentions urged on behalf of the defendant, we here insert certain propositions which, in our judgment, are supported by the great weight of the more recent decisions emanating from both state and federal courts. Those propositions may, for convenience, be stated thus:

(a) A provision like the one in our Constitution is self-executing. *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626 and cases 1 there cited; *Fletcher Ency. Corps.* section 4143. To

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the same effect are many of the decisions hereinafter cited on other propositions.

(b) Where the Constitution or statute merely imposes or fixes the liability without providing how it shall be enforced, the bank's creditors may enforce it in an ordinary action either at law or in equity, and under such circumstances it seems that actions in equity have the preference. 2

(c) In case the Constitution or the statute fixing the liability fails to determine by whom the liability may be enforced for the benefit of the creditors, the Legislature may at any time determine who may sue the stockholders and what the nature of the proceedings shall be. *Gardiner v. Bank of Napa*, 160 Cal. 577, 117 Pac. 667; *Wilson v. Book*, 13 Wash. 676-679, 43 Pac. 939; *Milroy v. Spurr Mountain Min. Co.*, 43 Mich. 231-238, 5 N. W. 287; *Howarth v. Lombard*, 175 Mass. 576, 56 N. E. 888, 49 L. R. A. 301; *Selig v. Hamilton*, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. Ed. 1518, Ann. Cas. 1917A, 104; *Miners' Bank v. Snyder*, 100 Md. 57, 59 Atl. 707, 68 L. R. A. 312, 108 Am. St. Rep. 390. 3

(d) Under a constitutional provision like ours, when authorized by statute as in section 34, chapter 25, Laws Utah 1911, the receiver who is appointed to take charge of an insolvent bank's assets and wind up its affairs is the proper person to bring actions to enforce the stockholders' additional liability. In many cases it is held that the bank examiner or bank commissioner, or other officer discharging similar duties, may bring an action if authorized by statute. *Hanson v. Soderberg* (Wash.) 177 Pac. 827; *Davis v. Johnson* (N. D.) 170 N. W. 520; *Collier v. Smith* (Tex. Civ. App.) 169 S. W. 1108; *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085; *Harris v. Taylor*, 148 Ga. 663, 98 S. E. 86; *Elson v. Wright*, 134 Iowa, 634, 112 N. W. 105. 4

(e) Unless the statute (as is the case in Iowa) provides a different rule, the order or judgment of the court declaring the bank insolvent and adjudging that it is necessary to enforce the stockholders' additional liability to pay the bank's debts, in the absence of fraud or col- 5



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lusion, is conclusive upon the stockholders, and they may not assail the same except in a direct proceeding. *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98; *Straw & Ellsworth Co. v. Kilbourne, etc., Co.*, 80 Minn. 125, 83 N. W. 36; *London etc., Co. v. St. Paul P. I. Co.*, 84 Minn. 144, 86 N. W. 872; *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; *Austin v. Campbell* (Tex. Civ. App.) 210 S. W. 277; *Stringfellow v. Patterson* (Tex. Civ. App.) 192 S. W. 555.

(f) The method of procedure to enforce the liability may be changed by the Legislature if such change does not enlarge or affect the liability of the stockholder in case 6 the Constitution, as before stated, does not provide a method of procedure. *Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105; *Miners' Bank v. Snyder*, 100 Md. 57, 59 Atl. 707, 68 L. R. A. 312, 108 Am. St. Rep. 390; *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; *Henley v. Myers*, 215 U. S. 373, 30 Sup. Ct. 148, 54 L. Ed. 240.

(g) Under constitutional and statutory provisions like ours it is not essential that all of the bank's assets be first exhausted before proceeding to enforce the stock- 7 holders' additional liability, where it is made apparent that the bank is insolvent.

We remark that in referring to the foregoing cases we do not wish to be understood as having exhausted the number that might be cited in support of any one of the propositions. In that connection we also desire to state that there are also decisions to the contrary upon nearly all of the foregoing propositions. In our judgment, however, the foregoing propositions are sustained by the great weight of modern authority.

Recurring, now, to our constitutional provision by which the stockholders' additional liability is imposed. It will be observed that the liability is couched in the most general terms. The liability that the Constitution imposes is a gen-

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eral one, namely, that the stockholders "shall be individually responsible for an additional amount equal to the amount of their stock in such corporation *for all its debts and liabilities of every kind.*" (Italics ours.) It is too well settled to admit of controversy, although not always kept in mind by either courts or counsel, that where certain rights are granted or certain liabilities are imposed by state Constitutions, all that is intended thereby, unless otherwise expressed in the instrument itself, is that the Legislature is bound by the constitutional provision as written. In other words, such Constitutions are merely limitations upon the powers of the state Legislatures. If, therefore, the Constitution is silent respecting the remedy by which or through whom the right that is granted or the liability that is imposed shall be enforced, the Legislature possesses full power to provide such a remedy, provided it is adequate, to effectuate the purpose of the constitutional provision. In imposing the stockholders' additional liability the framers of our Constitution did not in the slightest degree limit the right of the Legislature to provide a remedy for its enforcement. That matter, like other remedies, was left entirely to the judgment of the Legislature. True, as before pointed out, the constitutional provision was self-executing, and, in view of that fact, the principle that is invoked by the courts is that in case a right is created and there is no special method provided for its enforcement the courts will enforce such right in accordance with 8 some known remedy which can be made applicable. In the absence of any special remedy, therefore, the courts of this state would enforce the constitutional liability in accordance with some known remedy. That is precisely what this court held in the cases of *Steinke v. Loofbourow*, 17 Utah, 252, 54 Pac. 120, and *McLaughlin v. Kimball*, 20 Utah, 254, 58 Pac. 685, 77 Am. St. Rep. 908. As the law stood when those cases were decided no special remedy had been provided, and hence it was held that the right to enforce the stockholders' additional liability was not vested in the general receiver of the defunct bank, but was vested in the bank's creditors, and that the remedy must be sought in a court of equity. In the

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case of *McLaughlin v. Kimball*, however, the court was careful to point out that the decision was based solely upon the fact that the Legislature had not provided a special remedy, and that to do so was within its power. Referring to that question the court said:

"Admitting that it would be a convenient and desirable remedy for the receiver of a corporation to collect for the creditors their dues from the stockholders, the relief is to be sought at the hands of the Legislature and not the court."

The Utah cases, therefore, do not support the contention of defendant's counsel that the right to sue the stockholders to recover the additional liability is exclusively 9 vested in the creditors of the bank. Upon the contrary, the cases clearly recognize the doctrine stated in proposition (f), above set forth, and are in harmony with the cases cited in support of that proposition.

Counsel have, however, cited and specially rely upon the case of *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273, in which the Supreme Court of Illinois held that the right to sue is exclusively vested in the bank's creditors. That decision, however, is based upon former decisions of the same court, and seems to be based upon the wording of Illinois Constitution, art. 11, section 6, which provides that the stockholders "shall be individually responsible and liable to its creditors"; that is, the bank's creditors. It is there held that the right to enforce the liability is a personal right vested in the creditors by the express terms of the Constitution. As already pointed out, however, our Constitution merely provides that the stockholders shall be liable for the "debts and liabilities" of the bank. That does not mean or imply that a stockholder may be sued to enforce that liability by any creditor at any time the bank fails or refuses to pay the creditor's demand.

While the right to sue is held to be in the bank's creditors in California, it was so held by virtue of a special statute, which provides that—

"Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each." Cal. Civ. Code, section 322.

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The California Constitution imposes a liability quite similar to ours, and section 322 was passed as a means of enforcing that liability. No one, so far as we know, has ever questioned the right of the California Legislature to pass that section. In view, therefore, that our Constitution is silent respecting the enforcement of the liability, we can see no legal objection whatever to the right of the Legislature to pass an act for the speedy and economical enforcement of the liability for the benefit of all the bank's creditors.

It is, however, asserted that the funds derived from the stockholders' additional liability are no part of the assets of the bank and hence the general receiver of the bank is not authorized to receive or to administer them. It is cheerfully conceded that the stockholders' additional liability is not an asset of the defunct bank in the sense that that term is generally used and applied. The liability is, however, imposed as an additional security for the payment of the bank's debts and liabilities. The funds derived from the stockholders' additional liability must, therefore, be applied to the payment of the bank's debts. That, however, may also be said with regard to the general assets of the bank. A perusal of that portion of section 34 of chapter 25 which we have quoted makes it quite clear to our minds that the receiver is not empowered to proceed to enforce the stockholders' additional liability merely by virtue of his office as receiver, but that he is specially authorized to do that if it is necessary to do so to pay the bank's debts and liabilities. If the general assets of the bank are sufficient to pay those debts, no authority is conferred on any one to enforce the additional liability, and none is necessary. It manifestly was the intention of the Legislature that the person who is appointed the general receiver of the bank, in case the general assets are insufficient to pay its debts, is by virtue of the act specially authorized to proceed to enforce the stockholders' additional liability for the purpose of paying the debts of the bank. He thus becomes the special agent or trustee for that purpose precisely as by virtue of his receivership he becomes the arm of the court to collect and to administer the bank's general assets under its orders and

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direction, the only difference in that regard being that, while the receiver may by the court be permitted to use the general assets of the bank to pay the expenses of administering the affairs of the bank generally and to defray the costs of litigation incident to such administration, the funds derived from the additional liability, as expressed in the Constitution, must be applied in payment of the bank's "debts and liabilities." This fund may therefore not be squandered in litigation, and cannot be used for the purpose of defraying the general expenses of administering the affairs of the defunct bank, but may be used to defray such costs and expenses only as are necessarily incurred in the enforcement of the stockholders' additional liability. In collecting from the stockholder his proportion of what may be necessary to pay the bank's debts, not exceeding the amount fixed in the Constitution, the rights of the stockholder are certainly not only not invaded, but are strictly upheld. Again, requiring the stockholders to pay the full amount of their liability as fixed by the Constitution and to pay the same to the special agent or trustee aforesaid to the full extent contemplated by the Constitution and for the benefit of the creditors in no way invades or affects their rights.

The contention made by counsel that the right of enforcement of the stockholders' additional liability is exclusively vested in the bank's creditors would necessarily lead to this: That each creditor may exercise his choice regarding the stockholder he will sue. The creditor could thus compromise with a particular stockholder, or particular stockholders, for a consideration entirely outside of the constitutional liability, and thus one favored stockholder might be required to pay only a small percentage of his total liability to pay the bank's debts while other stockholders might be required to pay one hundred per cent. of their liability. Counsel, however, suggest that every creditor has the legal right to either sue or not sue as he may see fit; that he has the legal right to claim all or only a part of the debt owing to him by the bank, and that he may dispose of his claim as he may choose. No one disputes these propositions, and no one can successfully contend

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that the rights referred to are invaded by the enforcement of the liability as herein suggested. No doubt any creditor of the bank may demand all or only a part of his claim. This, however, is precisely what he may do under the law as it now stands and as we have herein construed it. Will it be contended that any creditor may sue any stockholder without first establishing whatever claim such creditor may have or prefer as constituting a valid indebtedness against the bank? If that be once conceded, does it not inevitably follow that the bank is deprived of its right to interpose any legal defense it may have against the claim preferred by the creditor, and that the stockholder, who knows nothing concerning the transactions between the bank and the claimant, must at his peril defend for the bank? Surely no such incongruity could have been contemplated by the framers of the Constitution.

We think it is manifest that under our Constitution the bank's creditors must establish their claims against the bank in the proceeding pointed out by the law, and that the bank must be given an opportunity to interpose any defense it may have, and that it is only after the bank's debts have thus been established that the stockholders' additional liability may be enforced. If each creditor may sue at any time in any court any stockholder he may elect of whom the court may obtain jurisdiction the ultimate result must be anything but logical, economical, or speedy. We think the state has an interest in these matters, and that by virtue of that interest, when not limited by the Constitution, it may provide a special remedy to enforce the stockholders' additional liability if that be found necessary to pay the bank's debts.

We are also of the opinion that the remedy provided in section 34 of chapter 25, *supra*, is adequate, economical, and speedy, and in no way contravenes anything that is said or implied in our Constitution. In case no remedy is provided by the Constitution and that instrument merely creates a general liability, the great weight of authority is to the effect that the Legislature may not only provide a remedy, but may change the remedy from time to time. Such is the effect of the conclusion of the Supreme Court of the United States. In

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the case of *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, Mr. Justice DAY, in speaking for the court, in the course of the opinion, says:

"It may be regarded as settled that upon acquiring stock the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature, and, as such, capable of being enforced in the courts, not only of that state, but of another state and of the United States, *Whitman, etc., v. Bank*, 176 U. S. 559 (20 Sup. Ct. 477, 44 L. Ed. 587), although the obligation is not entirely contractual and springs primarily from the law creating the obligation. *Christopher v. Norvell*, 201 U. S. 216 (26 Sup. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740.)

"Is there anything in the obligation of this contract which is impaired by subsequent legislation as to the remedy enacting new means of making the liability more effectual? The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the Legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made.

"This principle was stated by Mr. Chief Justice Marshall in *Sturges v. Crowninshield*, 4 Wheat. 122 (4 L. Ed. 529), as follows:

"The distinction between the obligation of a contract and a remedy given by the Legislature to enforce that obligation exists in the nature of things, and, without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct."

There are numerous other cases, emanating from both state and federal courts, announcing the same doctrine, many of which are cited in support of some of the several propositions we have hereinbefore stated.

It is, however, further contended that section 34 of

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chapter 25 merely authorizes the receiver to collect the bank's general assets. If the contention were not urged by counsel of whose ability we entertain the highest regard, we should hardly deem it of sufficient importance to merit special reference thereto. A mere cursory reading of section 34, *supra*, clearly shows that the Legislature intended to and did refer to both the general assets and to the stockholders' additional liability imposed by the Constitution, and that the authority to enforce the latter was conferred only in case 10 it was necessary to pay all of the bank's debts. If the general assets are sufficient for that purpose, no authority is vested in any one to enforce the additional liability. The section, therefore, cannot be construed as counsel contend. While it is true that counsel's contention prevailed in the case of *Williams v. Carver*, 171 Cal. 658, 154 Pac. 472, it is equally true that such a construction was forced upon the Supreme Court of California in view of an existing statute. That court, therefore, was compelled to apply the familiar doctrine that where conflicting provisions exist the effect of the language must at times be restricted or enlarged in order to harmonize and give effect to all of the conflicting provisions if such a course is permissible. That is precisely what the Supreme Court of California did in deciding the case of *Williams v. Carver*, *supra*. Such a dilemma is not presented to us here. We are required, however, to give force and effect to all that is said in section 34 of chapter 25, and if we do that no other construction is permissible than the one we have given it.

It is also contended that section 34 of chapter 25 is invalid for the reason that the subject-matter thereof is not expressed in the title of the act, and that it is not clearly 11, 12 expressed therein as provided by our Constitution. This court is now irrevocably committed to the doctrine that a legislative act may not be stricken down upon the alleged ground that it is unconstitutional, unless it is clearly and palpably so. *Marionaux v. Cutler*, 32 Utah, 475, 91 Pac. 355, where the cases are collated and reviewed. To the same effect are *Edler v. Edwards*, 34 Utah, 13, 95 Pac. 367; *State v. Cand-*



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land, 36 Utah, 406, 104 Pac. 255, 24 L. R. A. (N. S.) 1260, 140 Am. St. Rep. 834, and *Salt Lake City v. Wilson*, 46 Utah, 60, 148 Pac. 1104. It would largely be a work of supererogation to enter again upon a discussion of the question just stated and decided in those cases. It is true that the Supreme Court of California, in *Williams v. Carver*, supra, held that the title to the California banking act was insufficient, but the holding in that case was based upon a title which was very much restricted. The title there in question reads: "An Act to Define and Regulate the Business of Banking." Session Laws, Cal. 1909, p. 87. The court seemingly gave little or no force to the word "regulate." Be that as it may, however, the title to chapter 25 is much more comprehensive than was the title to the California act. Instead of comprising only ten words, as was the case in the California act, the title to chapter 25 contains more than one hundred and fifty words. While the number of words is not necessarily controlling, yet the words must all be given their ordinary meaning, and if that be done the title to chapter 25 is sufficient to indicate the subject-matter of the whole act.

Nor does section 34 constitute a separate and distinct subject within the constitutional provision. It is also well settled, as pointed out in *Marionaux v. Cutler*, supra, 13 that a title may be so restricted as to prevent matters which under a more comprehensive title might well be included in the act from being included therein because of the restricted character of the title.

In any event, however, the title to chapter 25 is not so clearly defective as to authorize us to declare the act invalid for the reason stated.

It is also vigorously urged that the complaint is insufficient because it contains no allegation that it is necessary to enforce the stockholders' additional liability. The allegation of the complaint in that regard is that the bank is "hopelessly insolvent, and its assets were and are insufficient to pay its debts and liabilities, and in order to pay the same it is necessary to collect the full and entire amount of the statutory stockholders' liability," etc. That allegation is supplemented by a

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statement that the district court, in a certain proceeding and upon due notice and evidence, had found and had entered an order or judgment that it was necessary to collect the full amount of the stockholders' additional liability in order to pay the debts of the bank. These allegations, it seems to us, are quite sufficient to meet counsel's objections. They, however, insist that the order or judgment is without force or effect because the court was not authorized to make such an order or to enter such a judgment. That contention, to say the least, is somewhat remarkable. How is the question whether the general assets of the bank are sufficient or insufficient to pay its debts to be determined except in a judicial proceeding? How can any one know the amount of the bank's debts or who are its creditors unless those questions are judicially determined? In every case where it becomes necessary to wind up a bank's affairs upon the ground of insolvency the amount of its liabilities, as well as the extent of its assets and who are its creditors, must be determined by a court having jurisdiction of the proceedings. In 14 view of the allegations in the complaint that the district court, upon a hearing "regularly noticed and had and evidence duly presented," found that the full amount of the statutory liability was necessary to pay the bank's debts, we must assume that that is precisely what was done in this case. That order or judgment as we shall see, is binding upon the stockholders, and of necessity must be so upon all creditors who presented their claims. That such is the law there is little if any room for doubt.

In the case of *Howarth v. Lombard*, supra, in referring to the effect to be given to the order or judgment in which the necessity of enforcing the stockholders' additional liability is determined, it is said:

"The ascertainment is like a common case of a judgment against a corporation which is binding on stockholders. The members of such corporations, as well as the corporations themselves, are within the jurisdiction of the local court so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. In reference to this kind of liability such decisions and orders are binding on stock-

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holders who are not before the court otherwise than by virtue of their membership in the corporation. *Elderkin v. Peterson*, 8 Wash. 674 (36 Pac. 1089); *Hawkins v. Glenn*, 131 U. S. 319 (9 Sup. Ct. 739, 33 L. Ed. 184); *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 336 (16 Sup. Ct. 810, 40 L. Ed. 986); *Glenn v. Liggett*, 135 U. S. 533 (10 Sup. Ct. 867, 34 L. Ed. 262); *Sanger v. Upton*, 91 U. S. 56, 58 (23 L. Ed. 220); *Marson v. Deither*, 49 Minn. 423 (52 N. W. 38); *Lewis v. Glenn*, 84 Va. 947, 979 (6 S. E. 866); *Hamilton v. Glenn*, 85 Va. 901 (9 S. E. 129); *Glenn v. Williams*, 60 Md. 93, 116."

In *Sanger v. Upton*, supra, the Supreme Court of the United States, in referring to the question, held that in contemplation of law every stockholder is "before the court in all proceedings touching the corporation," and thus he must be deemed to have been before the court in the proceedings wherein the liability of the bank is ascertained and fixed and in which the indebtedness of the bank is determined. Any other conclusion would necessarily lead to interminable litigation. If, however, the stockholders are "before the court" in such a proceeding and are bound thereby, it would seem that they should likewise have the right to directly attack the order or judgment for fraud or collusion, etc., and have it set aside. See 2 Black, Judgments, section 583. The attack must, however, be made directly and at the proper time and in the proper manner, and not collaterally by each stockholder when he is sued to recover the additional liability. If the right to assail the order or judgment directly for fraud, etc., is given to the stockholders they are deprived of no legal rights. Moreover, such an attack would be regular, orderly, and expeditious, while to permit each stockholder to assail such an order or judgment in the action in which his additional liability is sought to be enforced might lead to most incongruous results. Of course, any stockholder may set up any facts which show he is not liable.

In this connection it is also important to keep in mind that it is not necessary to exhaust and apply all of the general assets of the bank before proceeding to the enforcement of the stockholders' additional liability, in case it is made to appear that the funds to be derived from that liability are necessary to pay the bank's indebtedness. In referring to that subject

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the Supreme Court of Mississippi, in *Pate v. Bank of Newton*, 116 Miss. 666, 77 South. 601, which is a recent case, decided in February, 1918, in the course of the opinion, said:

"There is no requirement to await a collection and application of the debts and property of the bank before bringing this suit against the stockholders. In many cases it would require a considerable period of time to collect the debts and dispose of all the personal and real estate belonging to a bank, even though it might be perfectly manifest that when this is done there would still be a large deficit due to the depositors. If the bank or its liquidators were required to await until the debts had been collected and the assets converted into cash, many of the stockholders might escape liability by becoming insolvent or moving out of the jurisdiction of the court. When the stockholders pay this liability into the bank and it is applied to the satisfaction of the depositors' claims, and after the debts of the bank are paid, if there were any funds left the stockholder would naturally secure this remainder as a stockholder of the bank; and, of course, a stockholder who had paid the liability would first be repaid before any stockholder who had not paid such liability would be entitled to any dividend from the proceeds of the bank. We therefore think that the suit can be maintained whenever it is reasonably apparent that the assets of the bank will not pay the depositors."

Other courts have expressed the same thought in different language. A moment's reflection should convince that the reasons are practical, sound, and salutary. Why, in case a bank is hopelessly insolvent and cannot pay its debts, should its creditors be obliged to wait the slow process of converting all of the general assets of the bank into cash before calling upon the stockholders' additional liability to pay the debts which they are obligated to pay? If such a course be pursued it must often result in sacrificing valuable assets by too hastily converting them into cash. It is for the best interests of all stockholders that the assets of the bank be converted into cash at the best price obtainable therefor, and as nearly for their actual value as the conditions and circumstances will permit. It is not possible to do that if all of the assets are converted into money within a short or limited time. Again, any amount of money that is left after the debts are paid must by the receiver be distributed among the stockholders. Those who have paid their additional liability must, as a mat-

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ter of course, be preferred to those who have not paid up or only partly paid. In case, therefore, where it is manifest that a bank is insolvent it is to the best interests of all concerned that its debts be paid at as early a date as possible, and that the assets of the bank be not unnecessarily and unreasonably sacrificed by a forced conversion into cash at any price. The courts should exercise their full power in safeguarding, preserving, and protecting the rights of all the interested parties, stockholders as well as creditors, and require the receiver to proceed with reasonable expedition, but with fairness and justice to all. If such be done the method or nature of the proceedings to collect the stockholders' additional liability becomes of secondary importance. It therefore seems to us quite needless to waste time or energy respecting what the character or nature of the proceedings should be so long as the rights and interests of both the creditors and stockholders are preserved and protected. Moreover, this court has repeatedly held that under our Constitution all forms of action are abolished. That instrument explicitly directs, "There shall be but one form of civil action and law and equity may be administered in the same action." Why, then, longer quibble about what the form or nature of an action shall be? Under the foregoing constitutional provision the only question that should arise in any case is what relief, and the extent thereof, the complaining party may be entitled to under the law when applied to the conceded or established facts in the case. True, there are still equitable as contradistinguished from legal rights and remedies. Neither the rights nor the relief to which the litigants may be entitled, however, depend upon the form or nature of the action, but are entirely dependent upon the nature or character of the facts and the law applicable thereto. In this case, therefore, we see no reason whatever why, as a matter of economy and convenience if for no other reason, the receiver may not sue as many of the stockholders in one and the same action as may be most convenient for all concerned. Nor do we see why he should not sue all the stockholders in one action if he can obtain legal service upon them or if they voluntarily appear. Nor do

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we see why a stockholder, in case he is sued separately, may not ask that his case be heard in connection with other cases in case such a course would not prejudice the rights of others. We can well understand that, in view that there may be stockholders who have defenses that are not common to all stockholders, such stockholders may desire to try their cases separately. That, it seems to us, however, is no reason why all the stockholders within the jurisdiction of the court may not be sued in one action. If it should appear that they might, or some of them might, be prejudiced by a joint trial, the court should grant them separate trials or hearings. All that may be done in conformity with our procedure and without sacrificing the rights or interests of any one. Nor should such a course prevent any stockholder from appealing to this court separately. We are of the opinion, therefore, that the defendant's contention that he, as a matter of right, may demand to be sued jointly with all other stockholders, or that any stockholder may, as a matter of right demand to be sued separately, or that he may only be sued by a creditor or by several creditors is not well founded. Each stockholder may, however, have his rights protected as hereinbefore stated. 16

We remark that we perhaps have dwelt upon certain phases of the case longer than seems necessary. In view, however, that there are a large number of other actions pending in different courts and before different judges, we have deemed it best to state our reasons fully and in detail, to avoid, if possible, further delays and unnecessary litigation.

The judgment of the district court of Juab county is therefore reversed, and the cause is remanded to that court, with directions to overrule both the general and special demurrers, to permit the defendant to answer the complaint, and to set up such legal defenses as he may have, and to proceed with the case in accordance with the views herein expressed. Defendant to pay costs of this appeal.

CORFMAN, C. J., and GIDEON, and THURMAN, JJ., concur.

WEBER, J., being disqualified, did not participate herein.

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Appeal from Third District.

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## VALIOTIS v. UTAH-APEX MINING CO.

No. 3299. Decided October 10, 1919. (184 Pac. 802.)

1. TRIAL—TESTIMONY ASSUMED TRUE ON NONSUIT. Testimony for plaintiff must be assumed to be true on motion for nonsuit. (Page 156.)
2. TRIAL—IMPEACHMENT BY SHOWING CONTRADICTIONARY STATEMENTS. A statement signed by a witness and containing statements of fact inconsistent with his testimony is competent only for purpose of impeachment, and therefore raises a question of credibility of the witness for jury and not the court to decide. (Page 156.)
3. TRIAL—NONSUIT IMPROPER IN FACE OF SUSTAINING TESTIMONY. Court properly overruled motion for nonsuit where plaintiff's evidence tended to prove his cause of action. (Page 156.)
4. TRIAL—PLAINTIFF ENTITLED TO INFERENCES ON MOTION FOR NONSUIT. On motion for nonsuit, court may give to the plaintiff the benefit of every fair and reasonable inference that might properly be drawn from the evidence by the jury. (Page 156.)
5. TRIAL—INSTRUCTIONS SINGLING OUT FACTS IMPROPER. In action for injuries to employé, instruction *held* properly refused, in that by singling out certain facts which the evidence tended to prove it invaded province of jury. (Page 158.)
6. MASTER AND SERVANT—MISLEADING INSTRUCTION ON RES IPSA LOQUITUR. In an employé's action for injuries, a requested instruction that no negligence is to be presumed because of the happening of the accident *held* properly refused as misleading, in that jury might have misunderstood the term "accident" to refer to the accident with all attendant circumstances described by the witnesses. (Page 158.)
7. TRIAL—NECESSITY OF REQUEST FOR INSTRUCTIONS. If it was the contention of employer, being sued for injuries to employé from broken rung in ladder, that question of whether broken rung rendered ladder unsafe, was for jury, such idea should have been embodied in a proper request. (Page 159.)
8. MASTER AND SERVANT—ADMISSIBILITY OF EVIDENCE IN ACTION FOR INJURIES. In action for injuries to an employé from a loose rung in a ladder, evidence of the hoisting of heavy timbers which sometimes swung against ladder and loosened rungs was admissible to show the cause of the defect and necessity of frequent inspection by employer. (Page 160.)
9. NEW TRIAL—VERDICT PALPABLY AGAINST WEIGHT OF EVIDENCE. Trial judge should set aside verdict for insufficiency of evidence whenever in his judgment the verdict is clearly and palpably against the weight of the evidence, but generally ought

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not, in view of Comp. Laws 1907, section 3478 (Comp. Laws 1917, section 7208), disturb verdict if in his opinion there is substantial evidence to support it, since to do so would be to invade province of jury.<sup>1</sup> (Page 160.)

10. APPEAL AND ERROR—REVIEW OF QUESTIONS OF FACT. By constitutional provision, appeals do not lie on questions of fact in law cases.<sup>2</sup> (Page 162.)
11. APPEAL AND ERROR—REVIEW OF DISCRETION IN RULING ON MOTION FOR NEW TRIAL. The granting or denial of a motion for new trial founded on the insufficiency of the evidence to justify the verdict, where the evidence is conflicting, rests in the sound legal discretion of the trial judge, and his decision will not be disturbed on appeal unless there is a clear abuse of discretion.<sup>3</sup> (Page 162.)
12. APPEAL AND ERROR—REVIEW OF RULING ON MOTION FOR NEW TRIAL. Appellate court will examine evidence to ascertain whether there is a substantial conflict or whether there is substantial evidence to support verdict, and if there is a substantial conflict will hold that lower court did not abuse its discretion in refusing new trial, but if evidence is incredible or inherently improbable or inconsistent with natural laws as to impel conclusion that verdict is result of mistake, prejudice, or passion, court will hold lower court in error notwithstanding some conflict in the evidence.<sup>4</sup> (Page 164.)
13. MASTER AND SERVANT—NOTICE OF DEFECT IN LADDER AS JURY

<sup>1</sup> *Nelson v. Rapid Transit Co.*, 10 Utah, 196, 37 Pac. 268; *Farr v. Griffith*, 9 Utah, 416, 35 Pac. 506.

<sup>2</sup> *Whittaker v. Ferguson*, 16 Utah, 240, 51 Pac. 980; *Harris v. Laundry Co.*, 39 Utah, 436, 117 Pac. 700, Ann. Cas. 1913E, 96; *Hill v. S. P. Co.*, 23 Utah, 94, 63 Pac. 814; *Hoggan v. Oahoon*, 31 Utah, 172, 87 Pac. 164; *Nelson v. S. P. Co.*, 15 Utah, 325, 49 Pac. 644; *Anderson v. Mining Co.*, 15 Utah, 22, 49 Pac. 126; *Connor v. Raddon*, 16 Utah, 418, 52 Pac. 764.

<sup>3</sup> *White v. Union Pac. Ry. Co.*, 8 Utah, 56, 29 Pac. 1030; *Nelson v. Rapid Transit Co.*, 10 Utah, 196, 37 Pac. 268; *Anderson v. Railway Co.*, 35 Utah, 509, 101 Pac. 579; *Lancino v. Smith et al.*, 36 Utah, 462, 105 Pac. 914.

<sup>4</sup> *Railroad Co. v. Board of Education*, 32 Utah, 310, 90 Pac. 566, 11 L. R. A. (N. S.) 645; *State v. Brown*, 36 Utah, 46, 102 Pac. 641, 24 L. R. A. (N. S.) 545; *Cobb v. Hartenstein*, 47 Utah, 174, 152 Pac. 424; *Russell v. Watkins*, 49 Utah, 598, 164 Pac. 867; *Newton v. Railroad Co.*, 43 Utah, 229, 134 Pac. 571; *Christianson v. Railroad*, 35 Utah, 146, 99 Pac. 680, 20 L. R. A. (N. S.) 255, 18 Ann. Cas. 1159; *Tremelling v. Southern Pac. Co.*, 51 Utah, 189, 170 Pac. 84; *Jensen v. Railroad Co.*, 44 Utah, 100, 138 Pac. 1185.



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**QUESTION.** In action for injuries to employé from a loose rung in a ladder, where defense was that employé had slipped off a secure rung and that employer had no notice of the defect, *held*, under the evidence, that the case was for the jury. (Page 169.)

14. **NEW TRIAL—INSUFFICIENCY OF EVIDENCE.** In action for injuries to employé from loose rung in ladder where defense was that employé had slipped off a secure rung and that employer had no notice of defective rung, court did not abuse its discretion in overruling motion for new trial because of insufficiency of evidence, where evidence was conflicting and subject to different inferences and presented a case of the credibility of witnesses. (Page 170.)

Appeal from District Court, Third District, Salt Lake County; *R. B. Porter*, Judge.

Action by Dan Valiotis against the Utah-Apex Mining Company. Judgment for plaintiff, and defendant appeals.

**AFFIRMED.**

*King, Straup, Nibley & Leatherwood*, of Salt Lake City, for appellant.

*Olson & Lewis*, of Salt Lake City, for respondent.

**PRATT**, District Judge.

Plaintiff brought this action to recover damages for personal injuries sustained by him on October 10, 1916, while working as a miner for the defendant in its mine at Bingham Canyon, Salt Lake county, Utah.

Among other facts, plaintiff's complaint in substance alleges that on October 10, 1916, the defendant had provided as a means of ingress and egress to and from the working place of the plaintiff in said mine a certain manway consisting of wooden ladders extending vertically between two levels in said mine (the 1,300 and 1,200 foot levels) of a height of about 100 feet; that prior to and at the time of the injury to plaintiff the defendant negligently and carelessly caused and per-

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mitted one of the steps or rungs on said ladderway to be broken or loosened so as to afford no support for plaintiff's feet at that point; and that by reason of the said carelessness and negligence of the defendant the plaintiff, while descending said ladderway, on or about the 10th day of October, 1916, fell down the shaft or manway in which the ladderway was constructed, a distance of about eighty-five feet, and was thereby greatly and permanently injured, etc. Defendant's answer denies these allegations of the complaint, and alleges contributory negligence and assumption of risk on the part of the plaintiff.

The case was tried to a jury and resulted in a verdict and judgment for the plaintiff upon conflicting evidence. At the close of plaintiff's case, defendant moved for a nonsuit, which motion was overruled by the court. After verdict and judgment for the plaintiff, defendant moved for a new trial, which motion was also overruled by the court, and thereafter in due time defendant appealed.

The record discloses the following facts: Three shifts were employed in defendant's mine, each consisting of drillmen, timbermen, and muckers, and each shift being in charge of a shift boss. The first shift went to work at 8 o'clock in the morning, was relieved at 4 o'clock in the afternoon by the second shift, and the second shift was relieved by the third at midnight, which last shift worked until 8 o'clock in the morning. The change of shifts was effected in about one-half hour, so that the second shift, on which plaintiff worked at the time of his injury, went to work at about 4 o'clock in the afternoon and quit work at 11:45 at night, and the third shift began work about 12:15 a. m. On October 10, 1916, and for several months prior thereto, the three shifts, in turns, had been working in the mine on the 1,200-foot level, which level was reached from the next lower level, known as the 1,300-foot level, by means of the ladder in question. This ladder consisted of two by four inch uprights, on which were nailed two by four crosspieces, or rungs, a foot apart, the extremities of which rested in grooves in the upright sides and face of the ladder cut to a depth of one and one-half inches and of suffi-

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cient width to receive the rungs. There was some conflict in the evidence as to the size of the nails used to fasten the ends of the rungs into the grooves. The ladder was erected in sections, end to end, and stood vertically between the two levels to a height of about one hundred feet, in a shaft four feet eight inches square. In going to and returning from their place to work on the 1,200-foot level, the men were required to climb up and down this ladder, each carrying a light. Heavy timbers and drills were hoisted up through the same shaft, and it was shown that the timbers sometimes swung against the ladder and loosened the rungs, necessitating repairs. Timbers had been so hoisted some time during the afternoon of October 10th while plaintiff's shift was working on the 1,200-foot level. It was shown that the shift boss ordinarily followed his men in ascending the ladder when they went to work and preceded them in descending it when they quit their work, and that at lunch time it was his custom to descend the ladder to the 1,300-foot level and, after lunch, return to the place where his men were working. It was the shift boss' duty, and his practice, to order a timberman to make immediate repairs if he found anything wrong with the ladder. It was shown that the shift boss of the shift to which plaintiff belonged descended the ladder a few minutes before the accident. There was a conflict of evidence as to the condition of the ladder and, if defective, as alleged in the complaint, as to how long such defect had existed, as bearing upon the question of whether or not the defendant had constructive notice of it.

Plaintiff testified that as he climbed the ladder on the afternoon of the accident he did not notice any loose rungs, but that on leaving his work that night and climbing down the ladder he stepped on a loose rung about thirteen feet from the top, felt it give way, and he fell to the bottom, receiving certain injuries which he described.

The plaintiff having introduced his evidence tending to prove his cause of action as alleged (unless it was not shown that defendant had notice, either actual or constructive, of the defective condition of the ladder which caused plaintiff to

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fall), the defendant moved for nonsuit and contended in the lower court, and contends here, that it was not shown that defendant had notice, actual or constructive, of the defective condition of the ladder. The court overruled the motion, and this ruling of the court is assigned as error by the appellant.

Counsel for appellant contend that the only evidence having any tendency to prove either actual or constructive knowledge on the part of the defendant of any defect in the ladder was given by Nick Katrinas, a fellow workman of the plaintiff, who testified that he (Katrinas) had observed loose rungs in the ladder for three or four days prior to the accident and also on the day of the accident. But, say counsel, this witness was self-impeached by the typewritten statement which he admitted having signed and which he made to the defendant company in March, 1917, concerning the accident, in which the witness said that the ladder was "in good condition and no rungs were broken." This statement was introduced as Exhibit 1 on cross-examination of the witness. He testified that he did not know at the time of signing it that it contained such a statement of fact; that that part of the exhibit wherein it is stated that the ladder was "in good condition and no rungs were broken" had not been read to him; and that he could not read. "It was untrue," said the witness. This testimony on motion for nonsuit must be assumed to be true. Exhibit 1 was not competent proof of the facts stated in it and was not and could not be used as such. It was competent and material for the purpose of impeachment only. It raised, therefore, merely a question of the credibility of the witness, a question for the jury to decide and not for the court. As the evidence on behalf of the plaintiff tended to prove the cause of action alleged by him, and on motion for nonsuit the trial court must give to the plaintiff the benefit of every fair and reasonable inference that might properly be drawn from the evidence by the jury, the court did not err in overruling the motion for nonsuit.

Appellant complains of certain parts of the court's charge to the jury, to none of which did appellant reserve an exception except to paragraph 7 of the charge, which reads as follows:

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"If you find by a preponderance of the evidence that the defendant neglected to exercise reasonable care and diligence to maintain said ladder way described in plaintiff's complaint, in a reasonably safe condition, and that, by reason of said negligence on the part of the defendant, one of the rungs of said ladder, at or about a point thirteen feet from the top thereof, became so loose and insecure that it gave way under the weight of the plaintiff, as he stepped on it, while proceeding to descend the ladder, on or about October 10, 1916, thereby causing the plaintiff to fall down the manway, and sustain injuries as alleged in the complaint, your verdict should be for the plaintiff, unless you find by a preponderance of the evidence, that the plaintiff was himself guilty of negligence which proximately contributed to the injury, or unless you find that the plaintiff assumed the risk arising from such negligence of the defendant, as in these instructions explained."

Read and considered in connection with the entire charge, we fail to find prejudicial error in this instruction. But it is contended by counsel that this instruction and others given were contrary to defendant's requests Nos. 2 and 6, which the court refused to give. Those requests, refusal to give which is assigned as error, read as follows:

No. 2. "You are instructed that the plaintiff has not made out a case by merely showing that the step or round of the ladder was loose or broken. He is required to further show by a greater weight of the evidence that the defendant or its agents and officers whose duty it was to examine and repair the ladder, knew, or in the exercise of ordinary care could have known (of such condition), for a sufficient length of time prior to the accident, to have repaired the defect and have avoided the injury."

No. 6. "You are further instructed that no negligence is to be presumed or inferred against the defendant because of the happening of the accident, nor because the plaintiff fell from the ladder, nor are you to presume or infer any negligence on the part of the defendant merely because a round was loose or broken, or because it gave way as the plaintiff stepped upon it, if you should believe that there was any round loose or broken, or that it gave way."

Request No. 2 is, however, in substance contained in the court's instruction No. 13, whereby the court charged the jury as follows:

"If you find from the evidence that the defendant knew, or by the exercise of reasonable care ought to have known, that the

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rung of the ladder in question was loose and insecure, if you believe that it was loose and insecure, and if sufficient time had elapsed after such knowledge, or after defendant, by the exercise of reasonable care, ought to have had such knowledge, in which to make necessary repairs, and if then the defendant did not repair the ladder and make it secure, and the plaintiff was injured by reason of such failure, then the defendant was guilty of negligence."

Request No. 6 was properly refused by the court. It is open to the objection that it singles out of a mass of facts and circumstances, which the evidence tended to 5, 6 prove and which the jury had a right to consider, certain facts, minimizes their force and effect, and invades the province of the jury as to the inferences to be drawn therefrom in connection with all of the facts and circumstances as shown by the evidence. The request as framed was likely to mislead the jury, as the term "the accident" appearing in the request might have been understood by the jury to mean the accident with all the circumstances attending it, as described by witnesses, for the term "accident" is commonly used in that sense.

But it is urged by counsel that "it was not for the court but for the jury to say whether a loose or broken rung in the ladder rendered it unsafe or dangerous." If such was counsel's contention and the purpose of request No. 6, that idea should have been embodied in a proper request. No such request is contained in the record. It is quite evident from the record, particularly from defendant's requests, that the part of request No. 6 reading as follows: "Nor are you to presume or infer any negligence on the part of the defendant merely because a round was loose or broken"—was submitted on the theory of counsel that there could be no recovery by the plaintiff for an injury caused thereby unless defendant had knowledge of the defect or with ordinary care and diligence could have known of it in time to repair the ladder and prevent the injury.

However that may be, reasonable minds could not well differ as to the conclusion that the loose and insecure rung in the ladder, if proven, rendered it unsafe and dangerous, in

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view of the undisputed evidence as to the use to which the ladder was put, the number of employes using it, its vertical length of one hundred feet in a dark shaft, the necessity of carrying a light while ascending or descending the ladder, the serious injury, perhaps death, that might result from a fall from it, and the fact, which the jury must have found, that while the plaintiff was descending the ladder he stepped upon a loose and insecure rung, which gave way, and caused him to fall to the bottom of the shaft, without fault on his part. The entire absence of a rung, since the rungs were only a foot apart, would have been less of a menace, snare or delusion, as a workman would not be likely to intrust his weight to space while descending the ladder.

Appellant complains of the refusal of the trial court to give defendant's request No. 11, which reads as follows:

"You are instructed that the defendant, as the employer of the plaintiff, was not required to furnish him an absolutely safe place to work, nor was the defendant an insurer of the plaintiff against accident and injury. The defendant can only be chargeable with negligence, and can be held liable only in the event that you find that the defendant was guilty of negligence in the particulars alleged in the complaint."

Having charged the jury as the court did respecting the relative duties of the master and the servant, the risks assumed by the latter, and under what circumstances, and what circumstances only, the plaintiff could recover, it was not prejudicial error for the court to refuse to give this request. In our opinion the issues of fact and the respective theories of counsel for the parties were fully and fairly covered by the court's charge in its entirety, and the trial court did not err in the particulars assigned by appellant.

The next assignment of error upon which appellant relies relates to the admission of certain testimony. During the progress of the trial the plaintiff was permitted to 7 show that it was the daily practice of the defendant company to hoist heavy timbers up the manway in question, and that sometimes said timbers swung against the rungs of the ladder and loosened them. Defendant objected to this testimony on the ground that it was immaterial and not within

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the issues, which objection was overruled and an exception taken. Later, on direct examination, the same witness testified, without objection, that during the shift on which plaintiff was working on the day of his injury timbers were hoisted in the manway. There was other testimony tending to show the same facts.

In our opinion the testimony to which objection was made, especially in view of the fact that it was shown that timbers were hoisted in the manway during the shift 8 on which plaintiff had been working when he was injured, was admissible as tending to show the cause of the loose rung and also the necessity of frequent inspection of the ladder by the defendant. The jury was instructed by the court that plaintiff's recovery, if any, must be based upon the negligence charged in plaintiff's complaint and no other; so that in effect this testimony was properly limited to the purposes for which it could be considered.

Lastly, counsel for appellant contend that the lower court erred in overruling defendant's motion for new trial. In the language of counsel, it is affirmed that the trial court "ought to have granted a new trial because the verdict was manifestly against the clear weight of the evidence, and that this is so palpable as to indicate that the jury either misconceived or mistook the charge or the evidence, or abused their trust, and that the learned court below for this reason abused its discretion in not setting aside the verdict and in not granting a new trial."

It will be perceived that counsel for appellant do not contend that there was no evidence to support the verdict, but that the verdict is so palpably against the clear weight of the evidence as to indicate that the trial court abused its discretion in refusing to grant a new trial. In other words, we are asked to review the weight of the evidence.

It is undoubtedly true, as counsel for appellant contend, that the trial judge may and should set aside a verdict for insufficiency of the evidence and grant a new trial, 9 whenever in his judgment the verdict is clearly and palpably against the weight of the evidence. Not to do so



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would be an abuse of his discretion. Ann. Cas. 1912D, 1226, note; *Gate City Nat. Bank v. Boyer*, 161 Mo. App. 143, 142 S. W. 487; *Nelson v. Rapid Transit Co.*, 10 Utah, 196, 37 Pac. 268; *Farr v. Griffith*, 9 Utah, 416, 35 Pac. 506.

But the trial judge ought not as a general rule to disturb the verdict if in his opinion there is substantial evidence to support it. To set aside the verdict in such case would be to invade the province of the jury, in whom is vested the power to decide all questions of fact and to whom all evidence thereon is to be addressed. Comp. Laws Utah, 1907, section 3478; Comp. Laws Utah, 1917, section 7208. See 20 R. C. L. 277, where the rule is stated as follows:

"As the jury is the exclusive judge of the evidence, it must in reason be the exclusive judge of what constitutes the preponderance of the evidence, and, when that judgment is reached upon evidence sufficient to support a verdict, it should not be disturbed by the court."

Mr. Justice BREWER, in *Railway Co. v. Kunkel*, 17 Kan. 145, said:

"We do not mean that he (the trial judge) is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness. But when his judgment tells him that it is wrong, that whether from mistake or prejudice, or other cause, the jury have erred, and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury."

See, also, 20 R. C. L. 274, notes 9, 10, and 11.

The proper exercise of the trial court's power to set aside a verdict and grant a new trial has never been regarded as an invasion of the jury's function to decide the facts. If a new trial be granted, the trial court does not thereby decide a question of fact except only as it may be incidentally involved in its ruling as a matter of law that there is a legal insufficiency of the evidence to justify the verdict rendered. In such case the questions of fact are submitted to another jury

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for decision under proper instructions as to the law of the case.

While the trial court may, as we have seen, review the evidence, consider its weight and the credibility of witnesses, and grant a new trial, if satisfied that there is a marked and clear preponderance of the evidence against the verdict, it is quite generally held that an appellate court has no such discretion.

One of the obvious reasons therefor is that the appellate court, limited to the examination of the record merely, has not the advantage that the trial judge has to judge 10 such matters, having, as he does, the witnesses before him and being given the opportunity to see the witnesses, hear their testimony, and observe their demeanor while testifying. This is applicable alike to equity cases as well as law cases. *Wilcox v. Rhode Island Co.*, 29 R. I. 292, 70 Atl. 913; *Nelson v. Rapid Transit Co.*, 10 Utah, 193, 37 Pac. 268; *McCornick v. Mangum et al.*, 20 Utah, 17, 57 Pac. 428; *Endress v. Shove*, 110 Wis. 141, 85 N. W. 651. To which we may add that, by constitutional provision of this state, appeals do not lie on questions of fact in law cases. *Whittaker v. Ferguson*, 16 Utah, 240, 51 Pac. 980; *Harris v. Laundry Co.*, 39 Utah, 436, 117 Pac. 700, Ann. Cas. 1913E, 96; *Hill v. S. P. Co.*, 23 Utah, 94, 63 Pac. 814; *Hoggan v. Cahoon*, 31 Utah, 172, 87 Pac. 164; *Nelson v. S. P. Co.*, 15 Utah, 325, 49 Pac. 644; *Anderson v. Mining Co.*, 15 Utah, 22, 49 Pac. 126; *Connor v. Raddon*, 16 Utah, 418, 52 Pac. 764.

But as the right or power to review and decide controverted questions of fact on appeal in law cases did not exist prior to statehood and did exist, as now by constitutional provision, in equity cases, the constitutional restriction of appeals in law cases to the review of questions of law alone was probably intended to preserve this distinction without material change.

The granting or denial of a motion for new trial founded on the insufficiency of the evidence to justify the verdict, where the evidence is conflicting, rests in the sound 11 legal discretion of the trial judge, and the question directly involved on appeal is whether or not that discretion has been improperly exercised or abused. As said in the case of *Harrison v. Sutter St. R. Co.*, 116 Cal. 161, 47 Pac. 1020:

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"That the granting of a new trial is a thing resting so largely in the discretion of the trial court that its action in that regard will not be disturbed except upon the disclosure of a manifest and unmistakable abuse has become axiomatic and requires no citation of authority in its support."

And in *White v. Union Pacific Railway Co.*, 8 Utah, 56, 29 Pac. 1030:

"The rule is, when a motion is made for a new trial because of the insufficiency of the evidence and the testimony is conflicting, the granting or refusing a new trial is largely in the discretion of the trial court, and its act will not be overruled unless there is a clear abuse of discretion."

See, also, *Nelson v. Rapid Transit Co.*, supra; *Anderson v. Railway Co.*, 35 Utah, 509, 101 Pac. 579; *Lancino v. Smith et al.*, 36 Utah, 462, 105 Pac. 914.

This court has repeatedly held that the discretion of the trial court, exercised in granting or refusing to grant a motion for new trial, based on the insufficiency of the evidence to justify the verdict, cannot be interfered with when, upon examination of the evidence as disclosed by the record, it is apparent that there is a substantial conflict of evidence as to material issues of fact in the case relative to which the insufficiency is alleged. In such a case this court must hold as a matter of law that no abuse of discretion is shown. (Cases supra.) We must of necessity, however, in every such case examine the record of the evidence for the purpose of determining whether or not there is a substantial conflict or whether or not, as in the instant case, there is substantial evidence to support the verdict.

As said in *Railroad Co. v. Board of Education*, 32 Utah, at page 310, 90 Pac. at page 566, 11 L. R. A. (N. S.) 645:

"If there is no substantial evidence in support of any one or more of the material elements upon which the verdict and judgment rests, then it becomes merely a question of law for this court to determine, and we cannot shirk the responsibility of looking into the evidence to ascertain whether there is any substantial evidence in support of all the essential facts necessary to support the judgment by simply assuming that all questions of fact are for the jury and the trial court to pass upon."

See, also, *State v. Brown*, 36 Utah, 46, 102 Pac. 641, 24 L.

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R. A. (N. S.) 545; *Cobb v. Hartenstein*, 47 Utah, 174, 193, 152 Pac. 424; *Russell v. Watkins*, 49 Utah, 598, 164 Pac. 867.

If it should appear that the evidence on which the verdict is based is so incredible or inherently improbable or so inconsistent with or contrary to natural laws or physical facts, as to impel but the one conclusion that the verdict is the result of mistake, prejudice, or passion, we might then very properly say that the verdict is not supported by substantial evidence, or that there is not a substantial conflict of evidence, and therefore the lower court abused its discretion or erred in refusing to grant the new trial. In such a case we look into the evidence, examine its legal effect, and opposing logical tendencies, if any, not for the purpose of deciding the facts, as we may do in equity cases, but to determine whether or not the trial court erred in its application of fixed legal principles. Our power or authority to do so must, of course, be exercised cautiously; but the fact that an incautious exercise of such power may transcend our constitutional authority in cases at law to hear and determine questions of law only is not inconsistent with its existence. A question of law is never an abstract question. It arises only with respect to ascertained facts or their logical and legal tendencies as matter of proof. The inquiry then is: What are the facts? And, secondly, what is the legal principle applicable thereto? If the evidence, taken as a whole, be reasonably susceptible of opposite conclusions as to the existence or nonexistence of an ultimate fact, depending upon inferences to be drawn therefrom, or the weight to be given to the testimony of this or that witness, or set of witnesses, we must conclusively presume the fact to be such as will support the ruling which we are called upon to review; but if, after giving due consideration to the fact that the trial judge is better able to weigh conflicting evidence, the evidence be such nevertheless as to impel but one reasonable conclusion, and that as to a fact adverse to the ruling, it would be our duty as an appellate court to so declare, notwithstanding there might be some conflict in the evidence.

In *Stafford v. Adams*, 113 Mo. App. 717, 88 S. W. 1130, the court said:

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"It is the duty of courts to determine what constitutes substantial evidence, and the business of the triors of fact to settle conflicts therein."

And the same court, in *Brockman Commission Co. v. Aaron*, 145 Mo. App. 307, 130 S. W. 116, said:

"While appellate courts uniformly adhere to the rule that the credibility of witnesses and the weight to be given their testimony are issues of fact and not of law, the rule has never been carried to the length of requiring courts to accord probative value to testimony that is so palpably false or absurd that no reasonable mind would give it any credence. It is within the province of the court to ascertain whether or not testimony has any evidentiary strength, and, if it is found to be impotent, to cast it aside as tho it had not been given."

In the case of *Toledo, St. L. & W. R. Co. v. Howe*, 191 Fed. 776, at page 782, 112 C. C. A. 262, at page 268, "substantial evidence" is defined with reference to the facts of that case as follows:

"It must be, as said Judge Severens, 'something of substance and relevant consequence, and not vague, uncertain, or irrelevant matter not carrying the quality of "proof" or having fitness to induce conviction.'"

And again, at page 785, of 191 Fed., at page 271 of 112 C. C. A.:

"If the circumstances are such that it can be said fair-minded men might not agree as to the conclusions to be drawn, the case must be submitted to the jury."

In *Newton v. Railroad Co.*, 43 Utah, at page 229, 134 Pac. at page 571, this court said:

"If it is clear that the injured person failed to exercise ordinary care, the question is one of law; but, if the circumstances are such as to leave that question shrouded in doubt to the extent that different minds may fairly and honestly arrive at different conclusions, then it is a question of fact."

As applied to particular circumstances of the case, the following statement, bearing upon the substantial evidence rule, is approved by this court in the case of *Christensen v. Railroad*, 35 Utah at page 146, 99 Pac. at page 680, 20 L. R. A. (N. S.) 255, 18 Ann. Cas. 1159.

"Where the evidence of negligence is entirely inferential and the testimony for the defendant is clear and undisputed to the

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effect that there was no negligence, the plaintiff's case is overcome as a matter of law, and it becomes the duty of the judge to take the case from the jury."

The same doctrine was considered in the case of *Tremelling v. So. Pac. Co.*, 51 Utah at page 201, 170 Pac. at page 84, in the following language:

"It must not be assumed, however, that the rule thus stated can be given general application. Indeed, the rule can rarely be applied, since the evidence generally is such that it is the exclusive province of the jury to draw the inferences therefrom."

The following cases illustrate the principle that the appellate court will disregard evidence which is contrary to natural laws, physical facts, or scientific principles: Note to *Fleming v. Northern Tissue Paper Co.* (Wis.) 15 L. R. A. (N. S.) 701; *McCarthy v. Bangor & Aroostook Co.*, 112 Me. 1, 90 Atl. 490, L. R. A. 1915B, 140, and note; *Russell v. Watkins*, supra.

In *Jensen v. Railroad Co.*, 44 Utah, 100, 138 Pac. 1185, in which case it was urged that the trial court had erred in refusing to grant a new trial on the alleged ground that the verdict was excessive and was rendered under the influence of passion and prejudice, it was said:

"Whether a new trial should or should not be granted on this ground, of necessity, must largely rest within the sound discretion of the trial court. Still that court, in such particular, is not supreme or beyond reach. Its action may nevertheless be inquired into and reviewed on an alleged abuse of discretion, or a capricious or arbitrary exercise of power in such respect. Such a review is not a review of a question of fact, but of law. \* \* \* Our power to correct a plain abuse of discretion or undo a mere capricious or arbitrary exercise of power cannot be doubted."

What are the facts which appellant contends clearly demonstrate that the lower court abused its discretion in denying the motion for a new trial? Are they of such a nature that we may say as a matter of law that the verdict is not supported by substantial evidence?

While the evidence on the part of the defendant, consisting of the testimony of seven witnesses, tended strongly to prove that the ladder in question was in sound condition at the time of the accident, which occurred about 11:45 at night, when the workmen of the second shift were leaving their work and

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the third shift was preparing to come on, and that the plaintiff's foot probably slipped off a secure rung as he was descending the ladder, it was not conclusive. Not only the testimony of the plaintiff, but the testimony of three other witnesses produced in his behalf, equally positive and more direct, tended to prove that plaintiff's fall and consequent injury was caused by a loose rung which gave way as plaintiff stepped upon it. Reasonably certain it is that if the rung gave way as plaintiff stepped upon it, and caused him to fall, as he testified, the rung was loose and insecure at that time.

The testimony on the part of the defendant concerning the soundness of the ladder related to a time before and after the accident, but in a degree of remoteness therefrom that it did not preclude the possibility that the defect actually existed at the time of the accident, but had been immediately thereafter repaired by somebody, except only the testimony given by the shift boss, who descended the ladder about five minutes before the accident, and who testified that then "the ladder was all right, there was nothing wrong with it." But it is quite apparent even from the record of his testimony that he was conscious that he had made this statement of fact rather more strongly than he was justified in doing, because he added, "everything was—I could not find anything loose on it, that is, I didn't notice anything the matter with the ladder at all," clearly indicating the probability or possibility that a rung may have been loose which he failed to observe.

On the other hand, besides the testimony of the plaintiff as to the condition of the ladder and his consequent injury, one of his witnesses, who, it was shown, descended the ladder immediately before plaintiff descended it, testified in substance that when he reached the rung in question he felt that it was loose and avoided it by stepping over it to the next rung below. This witness was knocked from the ladder by the falling body of the plaintiff and was injured at the same time. Two other witnesses for the plaintiff, who descended the ladder a few minutes after the accident and were the last to leave the 1,200-foot level, each testified that when he descended the ladder he observed that the rung in question was missing, and

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one of them testified to the finding of a similar rung at the bottom of the shaft, near the ladder, which he picked up but left in the place where he had found it. This testimony was also corroborated by the other witness. Moreover, the conflict in the evidence as to the condition of the ladder at the time of the accident would have been largely explained if, as a matter of fact, somebody had replaced the rung of the ladder during the interim of about thirty minutes between the changing of shifts, which would be a very natural thing to do, and which any one of the timbermen might have done to prevent injury to the workmen of the on-coming shift.

Therefore, so far as the soundness of the ladder, or the looseness of the rung, and the resulting injury to plaintiff, is concerned, there was a substantial conflict of evidence which required the jury to weigh the conflicting evidence and the credibility of the witnesses who testified thereto and determine the question of fact thus presented. In view of the verdict of the jury and the trial court's ruling on motion for new trial, that question of fact must be resolved against the appellant and in favor of the trial court's ruling.

The only question about which there can be any serious or reasonable controversy is as to when the rung became loose and whether the defendant had timely notice thereof, actual or constructive. It appeared without contradiction that the shift boss of the shift to which plaintiff belonged descended the ladder about five minutes before the accident occurred, when the workmen on his shift had finished their labor and were about to descend the ladder to the 1,300-foot level. If, therefore, there was any evidence tending to show that the rung was loose at that time, the jury would have been justified in finding that the shift boss either observed it or, in the exercise of ordinary care, should have discovered it and caused immediate repair of the ladder to be made. If the jury believed the testimony of the witness Katrinas, who appellant contends was impeached, to the effect that he had noticed loose rungs in the ladder for three or four days before the accident and had also observed a loose rung at or about 4 o'clock in the afternoon of the day of the accident, when he, the plain-



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tiff, and others, including the shift boss, ascended the ladder to their work, then the question of facts as to whether the defendant had notice, actual or constructive, of such condition of the ladder, must also be resolved against the appellant, for it cannot in such a case be successfully contended that the defendant did not have at least ample time and opportunity to discover and repair the defect, especially in view of the fact that the shift boss followed the men up the ladder that afternoon and was the first man to descend the ladder when the men quit their work that night. But if the jury did not believe this testimony given by the witness 13 Katrinas—and it must be conceded that there is grave doubt as to its truth, as neither the plaintiff nor two of plaintiff's witnesses observed any such defects at that time, according to their testimony—there was nevertheless other evidence from which the jury could have found that the looseness of the rung had been caused some time between 4 o'clock that afternoon and the cessation of their work that night, and during the progress of said work, and therefore the defendant, through its shift boss, had timely notice thereof.

It was shown that the defendant was accustomed to use the manway in which the ladder was constructed for the purpose of hoisting heavy timbers from the 1,300-foot level to the 1,200-foot level, and that such practice sometimes caused those timbers to swing against the ladder and loosen its rungs, necessitating repairs, and that, while plaintiff and the workmen of the second shift were working on the 1,200-foot level on the day of the accident, such timbers were hoisted in the manway. Since there was no evidence of any other cause, it was for the jury to say whether or not the loose rung was caused by the hoisting of such timbers during that time. We cannot say that they were not justified in so affirmatively finding, and, if such was the fact, the shift boss, who preceded the men in descending the ladder about five minutes before the accident, had opportunity to discover it and cause it to be repaired, or at least the jury had the right to so find. Since the shift boss was charged with the duty of making necessary inspections and causing necessary repairs to be made, the

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knowledge that he might thus have acquired would be imputed to the defendant, his principal.

While, as it appears, the defendant had the preponderance in number of witnesses, it does not necessarily follow that the preponderance of the weight of the evidence was on the side of defendant or that the preponderance of the weight of the evidence was not in favor of the plaintiff. It was a case of the credibility of witnesses, substantially conflicting evidence and inferences to be drawn therefrom, concerning which fair-minded men might reasonably entertain different conclusions. Therefore, as the existence of the defective rung and defendant's knowledge thereof and sufficient opportunity to remedy it are the only findings of the jury which appellant contends are not justified by the evidence, and the record discloses no substantial error, it must be held as a matter of law that the trial court did not abuse its discretion in denying appellant's motion for new trial. The judgment of the trial court is therefore affirmed, with costs to the respondent. 14

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

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HOGGAN v. PRICE RIVER IRRIGATION CO. et al.

No. 3303. Decided October 10, 1919. (184 Pac. 536.)

1. **APPEAL AND ERROR—FILING OF AMENDED COMPLAINT SETTING UP NEW CAUSE OF ACTION HARMLESS.** The denial of defendant's motion to strike from the file an amended and supplemental complaint, because additional causes of action were set forth, referring to an allegation asking attorney's fees which was not in the original complaint, was not prejudicial error, where no attorney's fees were allowed and no further attention paid by either counsel or court to the question of attorney's fees. (Page 175.)
2. **PLEADING—CREDITORS' BILL NOT MULTIFARIOUS.** A complaint, in effect a creditor's bill after exhaustion of legal remedies, seeking to force a creditor's lien on debtor's property and to fol-

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low assets of the debtor corporation into the hands of all who are not bona fide purchasers, the facts stated relating wholly to the same general cause of action, is not multifarious, and not subject to demurrer for improperly uniting or mingling causes of action, which should be separately stated. (Page 176.)

3. CORPORATIONS—NEW CORPORATION ORGANIZED BY SELLER'S STOCKHOLDERS LIABLE FOR SELLER'S DEBTS. The management of one corporation may organize another and transfer its property to the new corporation, but if it does so, even with the consent of all its stockholders, the new corporation is liable for the debts of the other to the extent of the value of the property received; and, assuming that such conveyance was not void unless fraudulent, nor for the purpose of hindering or defrauding creditors, the creditors still have the right to follow the property thus transferred.<sup>1</sup> (Page 177.)
4. CORPORATIONS—STOCKHOLDERS ON TRANSFER TO NEW CORPORATION HAVING SAME DIRECTORS, NOT LIABLE FOR ULTRA VIRES ACTS. Evidence held not to show transactions by which debtor corporation was stripped of all its property resulted from fraud or bad faith of the directors, or that there was any dissipation of assets in making such conveyances, or any intent that such transactions should be of advantage to the directors of both the selling and buying corporation, except perhaps incidentally as stockholders and defendants in creditors' action, and those stockholders who were not directors of the debtor corporation at the time of such transfer were not accountable for the corporation's illegal or ultra vires acts. (Page 179.)
5. CORPORATIONS—RIGHTS OF CREDITORS ON TRANSFER OF PROPERTY TO NEW CORPORATION—SALES. A trust agreement, under which all the property of the debtor corporation was transferred to a new corporation, construed and held to provide that the proceeds of sale of water shares should be applied first to pay the debts the company incurred in connection with the construction of its irrigation project, excepting only a loan from the state, so that a creditor of the company was entitled to payment out of the proceeds of stock sales. (Page 182.)
6. CORPORATIONS—RIGHTS OF OFFICERS AND STOCKHOLDERS UNDER CREDITORS' BILL. Where individual stockholders, defendants in a creditor's suit, paid out their money for the corporation, a stockholder, who was not a director of the debtor corporation, had a right to accept a preference by payment in corporate stock whether the company was insolvent or not, but a director of an insolvent corporation had no right to do so

<sup>1</sup> *Cooper v. Light & Power Co.*, 35 Utah, 570, 102 Pac. 202, 136 Am. St. Rep. 1075.

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whether he became creditor as guarantor, indorser, or surety. (Page 183.)

7. **CORPORATIONS—PAYMENT OF NOTES TO DIRECTOR WHEN CORPORATION WAS INSOLVENT.** Where a corporation was willing to make unusually liberal discounts to a stockholder purchasing its notes, the purchaser would not for such reason be charged with fraud or dishonesty, but if such purchaser was a director when presenting the purchase notes for payment, and the company was then insolvent, he would not be justified in accepting and appropriating shares in a new corporation in payment of such debts, thus depriving other creditors of a fund to which they were entitled, and as director he must be presumed to know the corporation's financial condition. (Page 184.)
8. **APPEAL AND ERROR—INSUFFICIENCY OF RECORD TO ESTABLISH VALUE AT TRANSFER OF ASSETS TO NEW CORPORATION.** In a creditor's bill to subject property of a debtor irrigation company passing into the hands of another corporation to his claims, failure to determine whether the irrigation company was insolvent at a particular time leaves the Supreme Court unable to direct what findings should be made as to the price of the stock or water shares in the new company at the time of the transfer to it from the irrigation company; the price fixed in a trust agreement for transfer being purely fictitious. (Page 184.)

Appeal from District Court of Salt Lake County, Third District, *H. M. Stephens*, Judge.

Action by James W. Hoggan against the Price River Irrigation Company, a corporation, and others.

Judgment for plaintiff, and the named defendant and certain other defendants appeal.

REVERSED as to certain defendants, REVERSED and directed as to certain others, and AFFIRMED as to others

*M. Thomas* and *Soule & Spaulding*, all of Salt Lake City, for appellants.

*Willard Hanson* and *Dey & Hoppaugh*, all of Salt Lake City, for respondent.

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**WEBER, J.**

The substance of plaintiff's amended and supplemental complaint is that in 1906 he sold and conveyed the Mammoth Reservoir system, with buildings and personal property, to the Utah Irrigation & Power Company for \$20,000, on which a partial payment of \$500 was made; that on July 22, 1907, the Irrigated Lands Company, one of the above defendants, was incorporated under the laws of Utah, and took over the property of the Utah Irrigation & Power Company, and assumed the debts of the latter company, including plaintiff's claim; that in January, 1910, the Irrigated Lands Company made and delivered to plaintiff its promissory notes, secured by shares of stock in the Price River Irrigation Company and the Abraham Irrigation Company; that said notes were not paid when due; that plaintiff obtained judgment, sold the collateral which he had received with the notes for the sum of \$4,890, and that in one case the deficiency judgment amounted to \$13,910.90 and in the other the judgment was for \$882.82; that executions were issued and were returned wholly unsatisfied.

Plaintiff further alleges that on the 4th day of January, 1910, John Y. Smith, Van D. Spaulding, Thomas Austin, George A. Smith, Thomas Webb, Charles Tyng, William D. Livingston, David Morgan, Albert Smith, and Frank Nelsen constituted the entire board of directors and managing officers of said Irrigated Lands Company, and owned and controlled substantially the entire outstanding capital stock of said corporation; that at the same time the said John Y. Smith, George A. Smith, Thomas Austin, William D. Livingston, Albert Smith, Frank Nelsen, and David Morgan constituted the entire board of directors and managing officers and agents of the Price River Irrigation Company, and were the owners and holders of substantially all of its capital stock; that between the 1st day of August, 1909, and the 12th day of January, 1911, all of the defendants to this suit, contriving and intending to defraud the plaintiff of his claim against the Irrigated Lands Company, and with intent to hinder, delay, and

defraud its creditors, and wrongfully to appropriate to themselves, without any adequate or substantial consideration, all the assets of said last-named company, made and caused to be made by said company various pretended contracts and agreements with the Price River Irrigation Company, and the other defendants, whereby the Irrigated Lands Company conveyed and delivered, without any adequate or substantial consideration whatsoever therefor, all the property, real and personal, and all rights and franchises of the said Irrigated Lands Company to the said Price River Irrigation Company, and to the other defendants; that by reason of the transfers, assignments, and conveyances by the Irrigated Lands Company to the said defendants all of the assets of the Irrigated Lands Company were conveyed, transferred, and assigned to the said defendants, and said Irrigated Lands Company, by reason of the same, was rendered bankrupt and unable to pay any of its debts and obligations, including the debt and obligation owing to plaintiff; that the property so transferred, conveyed, and assigned to said defendants was worth at least the sum of \$200,000, and was more than ample to pay the debts and obligations owing plaintiff by the Irrigated Lands Company; that the shares of stock in the Price River Irrigation Company so transferred and assigned to the several defendants had, on or about the 24th day of October, 1908. been placed in trust with William D. Livingston, as trustee, for the purpose of paying the debts and obligations of the Irrigated Lands Company incurred for and in connection with the construction of said project of said Irrigated Lands Company, including the reservoir and main canals of the said Mammoth Reservoir system, other than a loan theretofore made by the state of Utah, and that plaintiff's claims heretofore placed in judgment were incurred in connection with the construction of said project and scheme, and for the reservoir site, maps, and filings, water rights and other property, and tools and implements in connection therewith; that said trust at the time of said transfer had not terminated, and the plaintiff by virtue of said trust was entitled in equity to a lien upon said stock and to be paid therefrom; that the said de-

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defendants and each and all of them well knew of said trust, and well knew of the rights of the plaintiff therein; that the transfer of said Price River Irrigation Company stock was a conversion of said stock and a violation of said trust, and the said defendants and each and all participating therein were, and are, liable to account to the plaintiff for the property so sold and converted; that by the said conveyances and assignments the Irrigated Lands Company was deprived of all its properties, franchises, and assets of every kind and description, including property necessarily held and used in the operation, use, and enjoyment of the rights and privileges conferred by its franchises, without which its franchises could not be successfully operated and enjoyed, and thereby became wholly insolvent and unable to pay plaintiff's claim or any part thereof, except so far as the same was secured by said collateral; that plaintiff had no notice, knowledge, information, or belief of the fraud until after rendition of the judgment hereinbefore pleaded; that defendants pretend that they do not now own and are not in possession or control of the property heretofore received by them, and that because they have ceased to own and hold said property they are relieved from all obligation to account herein; but plaintiff alleges that defendants in receiving said property, and in participating in the wrongful acts herein set forth, became and are liable to account for the full value of said property as of the date of the transfer; that by reason of the trust set forth in favor of plaintiff he is entitled to require all of said parties to account for said property and its value as of the date of the transfer thereof, and that the individual directors of the said Irrigated Lands Company, made defendants herein, are personally liable to plaintiff and the other creditors for the value of the property so dissipated and distributed by the said directors in violation of their trust and duties as such officers.

A motion was made by defendants to strike the amended and supplemental complaint from the files because additional causes of action were set forth. The motion 1 was overruled. It is contended that an allegation in which attorneys' fees were claimed was an additional cause of

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action, and should have been stricken. As no attorney's fees were allowed and no further attention was paid by either counsel or court to the question of attorneys' fees, the ruling of the court did not constitute prejudicial error. To allow the amendment, or the filing of a supplemental complaint was clearly within the discretion of the court, and the ruling on the motion was not erroneous. 15 C. J. 1445.

A demurrer was interposed on the ground that several causes of action had been improperly united and mingled together, and that the causes of action were not separately stated. The complaint is in effect a creditor's bill after exhaustion of legal remedies. The crux of it is that the creditor seeks to force a creditor's lien on the property of the debtor, and seeks to follow assets of the corporation debtor in the hands of all who are not bona fide purchasers. The facts stated in the complaint relate to the same general cause of action, and the complaint is therefore not multifarious. 15 C. J. 1424; 8 R. C. L. section 531; 2 Thompson. Corp. section 1317; *Haskin Wood V. Co. v. Cleveland S. Co.*, 94 Va. 439, 26 S. E. 878; *Wood v. Sidney S. & F. Co.*, 92 Hun, 22, 37 N. Y. Supp. 885. 2

Issues were joined by answers of defendants, and at the close of the trial the case was dismissed as to all defendants except Irrigated Lands Company, Price River Irrigation Company, Thomas Austin, George A. Smith, Albert Smith and John Y. Smith, who, with the exception of the Irrigated Lands Company, are the appellants here. All issues were found in favor of plaintiff. The court's conclusions of law were, in part:

"1. That the attempted transfer to the defendant the Price River Irrigation Company of the property and assets of the Irrigated Lands Company, under date of January 12, 1911, was fraudulent and void, and the taking of said property by the Price River Irrigation Company was a wrongful appropriation and conversion of said property as against the plaintiff herein; and that as against said plaintiff said property is and should be adjudged and decreed to be the property of the Irrigated Lands Company, and subject to plaintiff's judgments.

"2. That the plaintiff is entitled to have applied the property so attempted to be transferred and so converted, and the pro-



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ceeds thereof, to the satisfaction of his said judgments, heretofore set forth, recovered against the said Irrigated Lands Company; and to have and recover from said property, and the proceeds thereof, the sum of said judgments, together with interest to this date, aggregating the sum of \$18,812.80, and also interest hereinafter accruing until paid, together with his costs of suit.

"3. That a special master should be appointed to take over and sell so much of the real and personal property so wrongfully appropriated by the Price River Irrigation Company as may be required to pay plaintiff's claim, together with interest, costs of sale, special master's fees, and the costs of this suit.

"4. That in the event the proceeds of said sale are insufficient to pay the costs and expenses herein, and plaintiff's said claim in full, the plaintiff is entitled to a personal judgment for such deficiency as may remain against the Price River Irrigation Company, John Y. Smith, Thomas Austin, and George A. Smith, to the extent that the property so converted has been sold, mortgaged, or depreciated in value through the acts of the said defendant corporation, and while in its hands, which loss, dissipation, and depreciation of assets exceed the plaintiff's said judgments, and execution against said defendants should issue therefor."

Ninety alleged errors are assigned. The record is voluminous. We have read the testimony as it appears in both the abstract and the transcript. Except to refer to some of the more important of the essential facts, it is neither practicable nor necessary to review the evidence. That all the property of the Irrigated Lands Company was transferred to the Price River Irrigation Company, who refused to pay plaintiff the amount due him, is undisputed. In fact, when the last remnant of the Irrigated Lands Company's assets was transferred to the Price River Irrigation Company, it was expressly stipulated between the two corporations that the Price River Irrigation Company did not assume or agree to pay any of the obligations or indebtedness of the Irrigated Lands Company. It is also conceded that the Price River Irrigation Company never had any property save that received from the Irrigated Lands Company. The management of one corporation may organize another and transfer its property to the new corporation, but if it does so, even with the consent of 3 all its stockholders, the new corporation is liable for the debts of the other to the extent of the value of the property received. *Cooper v. Light & Power Co.*, 35 Utah, 570, 102 Vol. 55—12

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Pac. 202, 136 Am. St. Rep. 1075. Assuming that the conveyances to the Price River Irrigation Company were not void, nor fraudulent, nor made for the purpose of hindering or defrauding creditors of the Irrigated Lands Company, the plaintiff still had a right to follow the property which had been transferred to the Price River Irrigation Company. The object sought would have been attained as well without setting aside the conveyances. Giving the plaintiff a lien upon the property of the Price River Irrigation Company would have accomplished the same purpose. That, however, is merely a matter of form. We therefore approve conclusions of law 1, 2, and 3.

To understand conclusion No. 4 it is necessary to consider the evidence upon which it is based.

In August, 1908, the Irrigated Lands Company transferred the Mammoth Reservoir and other property to the Price River Irrigation Company, a corporation that had been organized by the management of the Irrigated Lands Company. The capital stock of the Price River Irrigation Company was \$500,000, divided into 20,000 shares of the par value of \$25 per share. Its capital stock was paid by acceptance of the property conveyed to it by the Irrigated Lands Company. With the exception of one share in the name of each of the incorporators, the stock of the Price River Irrigation Company was placed in the hands of a trustee for the benefit of the Irrigated Lands Company. It is claimed by appellants that the company was organized for the purpose of distributing water among farmers to whom the Price River shares were to be sold. Nothing appears in the record that effectually contradicts this claim. Instead of being a scheme to defraud, as claimed by plaintiff, it seems that it was, under the circumstances at that time, a sensible and businesslike plan, and perhaps as practical as any that could have been devised. When the conveyance of 1908 was made the Irrigated Lands Company agreed to complete the reservoir, and when the balance of the property was conveyed the alleged consideration for the transfer was the release by the Price River Irrigation Company of the other company's promise to complete the res-

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ervoir. These transactions stripped the Irrigated Lands Company of all its property, but the evidence, as we read it, does not warrant the conclusion that there was fraud or bad faith by the directors, or that there was any dissipation of assets by them in making these conveyances, or that in conveying the property to the Price River Irrigation Company there was any intent that such conveyance should be of advantage to these directors, or that they did or could make 4 any profit thereby, except, perhaps, incidentally as stockholders. All of the stock of the Price River Irrigation Company, except fourteen shares to the organizers, had been transferred to the Irrigated Lands Company, and was the latter's property, and so far the transaction was merely the exchange of property for stock, and the stock represented the value of the property so conveyed—all of the property of the Price River Irrigation Company. The stock represented so many shares of water rights, and these water rights represented the real value of the Price River project. With the exception of John Y. Smith, the individual appellants were not directors of the Irrigated Lands Company during 1908, and for that reason, if for no other, they should not be held accountable for any illegal or ultra vires acts of the Irrigated Lands Company during that year.

The court's conclusion of law No. 5, and the last, is as follows:

"That each of the defendants John Y. Smith, Thomas Austin, George A. Smith, and Albert Smith is a trustee ex maleficio of the 600 shares of stock of the Price River Irrigation Company received by the several defendants, from Wm. D. Livingston, trustee, and charged with a trust in favor of the plaintiff for payment therefrom of the debt due plaintiff hereinbefore stated. In the event that plaintiff's claim is not recovered in full from the sale of the property of the Irrigated Lands Company wrongfully taken over by the defendant corporation, or by execution against the defendants Price River Irrigation Company, John Y. Smith, Thomas Austin and George A. Smith, then, upon the coming in of the report of the special master showing the deficiency, the defendants should account for the trust stock so received by them, and turn over to the said special master the amount remaining in their hands; and upon said accounting, in so far as said stock has been disposed of by said several defendants, the said defendants

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should each severally be charged with the stock disposed of by him at the value of forty dollars per share, and upon such accounting (to the extent only required to pay the balance of plaintiff's said claim), a personal judgment should be entered against the said several defendants respectively, for the stock disposed of."

On September 1, 1908, the Irrigated Lands Company made its fifteen separate promissory notes, each in the sum of \$10,000. The payment of these notes was guaranteed by fifteen men who thereafter became the incorporators of the Price River Irrigation Company and who were stockholders of the Irrigated Lands Company. In July, 1908, a contract was entered into between the Irrigated Lands Company and the Irrigation Investments Company, by which the latter was to sell water rights in the Price River Irrigation Company for a price that would net the Irrigated Lands Company thirty-three dollars per acre. August 1, 1908, an agreement was executed between the proposed guarantors of fifteen promissory notes of \$10,000 each, to be issued and disposed of by the Irrigated Lands Company, providing that the personal liability among themselves should be \$10,000 each, or one-fifteenth of the total liability. October 24, 1908, the same date on which the Mammoth Reservoir and other property was transferred to the Price River Irrigation Company by the Irrigated Lands Company, a so-called trust agreement was executed by the two corporations. This trust agreement provided inter alia that 14,000 shares of stock should be sold in accordance with a certain contract between the Irrigated Lands Company and the Irrigation Investments Company, and that the trustee should see that the proceeds of sales of the water stock or rights would be applied as follows: First, in payment of the debts and obligations of the Irrigated Lands Company incurred for and in connection with the construction of said project, including reservoir and main canals, other than a loan of \$100,000 from the state of Utah; second, in payment of any bonuses allowed and agreed upon by the first party to be paid to those who aided in securing financial aid to the first party; and, third, to turn over any remaining proceeds to the Irrigated Lands Company.

It is contended by plaintiff that by the express terms of

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the trust agreement the proceeds of sales of this stock were to be applied, first, for the benefit of the creditors of the Irrigated Lands Company. Appellants insist that by the express terms of the agreement such proceeds were to be applied only in payment of the debts of the Irrigated Lands Company which might be incurred in the completion of the Price River project. Appellants further insist that if their construction be not plain and reasonable the district court erred in not permitting testimony to be introduced to show the intention of the parties as to who was included in the first class in this trust agreement. In our opinion, the claims of creditors were included in the provision where it is stated that proceeds of sale of water shares shall be applied:

"First, in payment of the debts and obligations of the Irrigated Lands Company incurred for and in connection with the construction of said project, including reservoir and main canals (other than a loan of \$100,000 from the state of Utah)."

It is found that the plaintiff had sold to the Irrigated Lands Company, not only the reservoir, but it is found by the court that the debt to plaintiff was incurred in connection with the construction of the Mammoth project, including the Mammoth Reservoir and main canal, the construction work already performed thereon, buildings which were to be used for construction purposes, cement, construction machinery and reservoir site, and water rights for water with which said reservoir was to be filled. The qualifying words, "other than a loan of \$100,000 from the state of Utah," clearly imply that the state was the only creditor to be excluded from participation in the proceeds to be derived from the stock placed for sale with the trustee. The trustee was given power to sell this stock in accordance with the provision of the sales contract with the Irrigation Investments Company, and he was given the power to sell at a price that would net the Irrigated Lands Company thirty-three dollars per share. The trustee contract was abrogated in February, 1909. At that time the board of directors of the Irrigated Lands Company authorized its manager to open and establish agencies for the sale of lands and water rights in the Price project, and to fix the price and terms of sale as he might deem for the best interests of the company;

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provided, water rights should in no case be sold for less than forty-three dollars per acre. It is argued, and the court found, that the so-called trust fund had been impressed with a lien for the plaintiff, and that he had a lien upon the stock itself. Under the agreement spoken of plaintiff was entitled to payment out of the proceeds of stock sales, but that would not give him a lien upon the stock itself, and unless he had such a lien the power that created the trust could also uncreate it and arrange for sales by the Irrigated Lands Company itself. It is evident that at that time the directors and stockholders of both companies had high hopes that the shares of stock and also land could be sold, and that sufficient would be realized to pay the fifteen notes heretofore mentioned and to complete the reservoir system. If those expectations had been realized the project would probably have been completed, and creditors would have been paid. But 5 the stock was not salable. The \$100,000 received from the \$150,000 in notes had in the meantime been spent. The evidence does not show any waste of this money, or that it was not expended for proper purposes. All the money was used in development of the Price River System. Neither fraud, bad faith, nor culpable negligence were shown on the part of the directors, who are defendants here. George A. Smith, Albert Smith, and Thomas Austin were not directors until after the money realized from the sale of so-called trust stock had been expended, and they certainly could not be held liable on the theory on which the district court held them accountable.

It is well settled in this jurisdiction that directors are prohibited from preferring debts due to themselves when a corporation is insolvent. *Mercantile Co. v. Mt. Pleasant Co-op.*, 12 Utah, 213, 42 Pac. 869. When the notes referred to became due all of the individual defendants were given stock for the money paid out by them for the corporation. That was in the fall of 1909. Defendant George A. Smith received 600 shares of stock in consideration of \$10,000 paid by him for the company, but at that time George A. Smith was not a director of the Irrigated Lands Company, and hence had a

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right to accept a preference whether the company was insolvent at that time or not. Thomas Austin, who also paid a \$10,000 note on which he had been guarantor, 6 was a director at the time, and if the Irrigated Lands Company was insolvent he should account for the stock that was received by him when he was both director and creditor. But it is said that he was only a guarantor. Assuming that Mr. Austin was a guarantor only, it would not change the principle involved. If a director who is a creditor of an insolvent corporation may not prefer himself, it is immaterial whether he prefers himself as a principal or as a guarantor or indorser or surety. He has no right to do by indirection that which he may not do directly. The adjudicated cases are not in harmony on this subject, but we think the better rule is that an insolvent corporation has no right to prefer the debt of a creditor where a director of a corporation is liable therefor as indorser, guarantor, or surety. *Bosworth v. Jacksonville Nat. Bank*, 64 Fed. 615, 12 C. C. A. 331; *Merchants' Nat. Bank v. McDonald*, 63 Neb. 363, 88 N. W. 492, 89 N. W. 770; *Tillson v. Downing*, 45 Neb. 549, 63 N. W. 836; 7 R. C. L. section 776, p. 761.

The record shows that John Y. Smith was at all times a director of both corporations, and that he received 600 shares of stock in payment of his claim against the Irrigated Lands Company. The court found that Albert Smith received 600 shares of stock. Mr. Albert Smith did not pay as guarantor, but purchased three notes of \$10,000 each on September 21, 1908, paying therefor \$20,000. Mr. Smith testified:

"I was one of the original signers of the fifteen \$10,000.00 notes, and the contract of August, 1908, signed by the fifteen guarantors. I purchased three of those notes September 21, 1908. I paid for them by check. Defendants' Exhibit 4 is one of the checks with which I purchased those notes. I issued another check for the same amount as that. I do not have that check. I have the stub from which I took it. I issued both checks at the same time, each for \$10,000, one of them I can't find. For those two checks I received three notes. When those notes became due I made an effort to collect them. I never did collect them, because the Irrigated Lands Company I suppose didn't have any money to pay me. They offered me 1,800 shares of water stock in October

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or November, 1909, if I recollect right. I didn't take it until I was forced to. I preferred the money in preference to the water stock. I finally took the water stock. I didn't make any investigation at that time to find out the value of the water stock. I didn't think there was any value on it. If there was it was a fictitious value. I simply had to take the water stock when they told me it was all they could give me. I took it for the money I paid. I took my chances of getting something out of it. I placed my stock on the market. Sold 300 shares at \$11, practically sixty days after I got it. I think I have 250 or 275 shares in my name now."

When Mr. Smith bought the three \$10,000 notes he was not a director, and if the corporation was willing to make the unusually liberal discount of \$10,000 we fail to perceive in the transaction anything that would subject him to the charge of fraud or dishonesty. However, in 1909, when he presented the purchased notes for payment, he was a director, and if the company was then insolvent or in imminent danger of insolvency, he was not justified in accepting the 1,800 water shares and appropriating them for the payment of debts due him and thus deprive other creditors of a fund to which they were primarily entitled. It may be possible that Mr. Smith had no suspicion of the insolvency of the Irrigated Lands Company, if it was insolvent, but it will not do to say that he did not know the financial condition of the corporation of which he was a director. It was his duty to know, and he is presumed to have known, the financial status of the corporation. 7

The question here arises whether the Irrigated Lands Company was insolvent or in imminent danger of insolvency in 1909. John Y. Smith, a director of both corporations from the dates of incorporation and continuing as a director thereafter, testified that the Irrigated Lands Company was insolvent when it conveyed the Mammoth Reservoir to the Price River Irrigation Company, and that it was insolvent from October 24, 1908. According to his testimony the Irrigated Lands Company was a venture in high finance, and was little more than a wild speculation, with assets that were at all times dubious. In its answer to plaintiff's amended complaint the Price River Irrigation Company alleges that on January 28, 1910, the Irrigated Lands Company was 8



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indebted to various creditors in the sum of \$300,000, and was therefore wholly bankrupt. On the other hand, we find in plaintiff's amended complaint the statement that the property transferred to the Price River Irrigation Company was worth, and still is worth, at least the sum of \$200,000. The issue as to whether the Irrigated Lands Company was insolvent in 1909 is not directly raised in the pleadings, nor is a direct finding made on the subject. With the record in this condition we are not inclined to direct what finding should be made as to insolvency in 1909. Neither are we inclined to direct what findings should be made as to the value of the Price River stock or water shares in 1909. The price fixed in the trust agreement was purely a paper or fictitious value. So was the twenty-five dollars par value. It occurs to us that the price at which the directors say they took it, that is, sixteen dollars and sixty-six and two-thirds cents per share, would be a more just basis of liability if the Irrigated Lands Company was insolvent in 1909.

The district court is therefore ordered to permit plaintiff, if he so desires, to amend his supplemental complaint, and permit the parties to offer further testimony on the issue of insolvency of the Irrigated Lands Company in 1908, and 1909, and if the corporation is found to have been insolvent or in imminent danger of insolvency in 1909 the court is further directed to find that the following directors took water shares or stock belonging to the Irrigated Lands Company for money due them at a time when they had no right to be preferred creditors, to wit, John Y. Smith, 600 shares; Thomas Austin, 600 shares; and Albert Smith, 1,800 shares. As to George A. Smith the judgment is reversed. As to John Y. Smith, Thomas Austin, and Albert Smith it is reversed, with directions to proceed further in the case as above indicated, if plaintiff desires to amend his complaint. In all other respects judgment affirmed. All costs to be taxed against Price River Irrigation Company.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

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**SHEPARD v. UTAH LIGHT & TRACTION CO.**

No. 3247. Decided October 11, 1919. (184 Pac. 542.)

1. **APPEAL AND ERROR—ASSIGNMENT OF ERROR ON DIRECTION OF VERDICT.** The assignment of error relied on by plaintiff appellant all challenging the action of the court in directing verdict, the question raised on appeal is whether defendant as a matter of law can be held under the facts and circumstances to answer for the damages sustained by plaintiff. (Page 190.)
2. **COUNTIES—RIGHT OF COUNTY COMMISSIONERS TO OBSTRUCT HIGHWAYS.** The county officials have a lawful right to temporarily obstruct highways under their jurisdiction for purpose of making improvements and repairs, and this right, when properly exercised, is paramount to the right of the public to free and unobstructed travel. (Page 193.)
3. **HIGHWAYS—LIABILITY OF TRACTION COMPANY FOR INJURIES DUE TO OBSTRUCTION.** A traction company, which pursuant to an order of county officials removed from its track on a county road dirt and rock and dumped the same on the road at a place designated by the county officials, to be used for repair of an intersecting avenue, held not liable for injuries to a traveler due to obstruction caused by the materials, which had then been received and taken charge of by the county, in view of Comp. Laws 1907, section 511, subd. 24, as amended by Laws 1911, chapter 119, section 511x24, and Laws 1909, chapter 118, as to jurisdiction of county commissioners over county roads. (Page 194.)
4. **HIGHWAYS—LIABILITY FOR OBSTRUCTION CAUSED BY LAWFUL ACT.** While work performed on a public highway in an unlawful manner or for no lawful purpose cannot be justified although performed under direction of authorized officers, a lawful act performed in a lawful way cannot create a nuisance, and does not give rise to an action in tort. (Page 195.)

GIDEON and WEBER, JJ., dissenting.

Appeal from District Court, Third District, Salt Lake County; *J. Louis Brown*, Judge.

Action by Lucile Shepard against the Utah Light & Traction Company, a corporation.

Judgment for defendant, and plaintiff appeals.

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**AFFIRMED.**

*M. E. Wilson*, of Salt Lake City, for appellant.

*Bagley & Ashton*, of Salt Lake City, for respondent.

CORFMAN, C. J.

Plaintiff brought this action to recover damages for personal injuries sustained by her through the alleged negligence of the defendant.

In substance the complaint alleges that on September 1, 1917, the defendant, a street car company, removed from its tracks located on State street, Salt Lake City, several cars of dirt and rock, and unlawfully and wrongfully caused the same to be unloaded upon the traveled portion of said street at or near what is known as Oakland avenue, an avenue extending at right angles westward from said State street; that said dirt was wrongfully and negligently permitted to remain upon said street, where it had been dumped and left, until after the accident complained of, without danger signals or other means being taken to prevent persons traveling upon the street from running into it; that said obstruction prevented persons from operating vehicles upon said highway and from having the free use thereof, and rendered the same dangerous to persons operating vehicles thereon. It is further alleged that on September 2, 1917, at about two o'clock a. m., while the plaintiff was riding on the back seat of a certain motorcycle operated upon said street by one John F. Husbands from Salt Lake City to Murray, said motorcycle ran into and partially over said obstruction, when with great force, the plaintiff was thrown from her seat on the motorcycle to the pavement on said street, and was thereby severely injured, to her damage in the sum of \$15,000, for which judgment is prayed.

The answer of the defendant denies negligence on its part, admits the removal of the dirt from the roadbed of its railway tracks on State street, and avers that said dirt so re-

moved by it was by order of the board of commissioners of Salt Lake county, and was taken charge of by said county on said State street at a point near Oakland Avenue, to be there used by said county to rebuild and repair certain roads in that vicinity. It is also alleged in the answer that the motorcycle upon which plaintiff was riding was carelessly and negligently operated, and that the plaintiff was guilty of negligence which proximately contributed to the injuries complained of by her while she was engaged in a joint enterprise.

The testimony shows that State street is a public thoroughfare running north and south between Salt Lake City and Murray City, upon which at or near the center the defendant has laid and operates a double-tracked street railway. West of the defendant's car tracks a sixteen-foot cement pavement is laid for vehicle travel. Immediately west of this paved strip there is about twelve or thirteen feet of dirt road, rolled down and also made available for vehicle travel. Oakland avenue is a narrower street than State street, is not paved, and runs at right angles westerly from State street. It has no car tracks upon it. Both State street and Oakland avenue are county roads, within the jurisdiction and under the supervision of the officers of Salt Lake county, and embraced in what is known as road district No. 5. On September 1, 1916, and for some months prior thereto the officials of Salt Lake county were engaged in the improvement of both State street and Oakland avenue. The work was being carried on under the immediate supervision of William H. Smith, the county road supervisor of said district No. 5, under the orders and direction of the county commissioners of Salt Lake county. On said day, at about twelve o'clock noon, the defendant, pursuant to an order made by and under the direction of the said county officials, removed from its tracks on State street eight cars of dirt and rock, and hauled and dumped them on said State street at or near Oakland avenue, at the place designated by the county officials. As we read the record, as had been the custom, after the dirt had been dumped by the defendant railway company, the county officials took charge of the dirt, removed it by teams from the car tracks so as not to

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impede the movement of defendant's cars, and then left it upon the paved track for vehicles on State street to be taken away and used by the county for the improvement of Oakland avenue. The dirt or obstruction thus placed and left upon the highway covered the paved portion of State street for a distance of about eleven feet in width, and in height ranged from about fifteen inches at the north end to twenty-seven inches at the south end.

After the dirt had been dumped from defendant's cars and was taken in charge by the county officials, the defendant exercised no further control nor supervision over it. William H. Smith, the county road supervisor, testified:

"I was apprised that the dirt had been delivered as I was going home from town. That was twelve o'clock noon. I shoveled up the loose dirt on the west side and straightened it up. \* \* \* I was going to use the dirt on Oakland avenue for the purpose of grading."

The dirt was left upon the highway rough and uneven, and no warning or danger signals were placed upon it during the daytime of September 1st, nor during the night-time following. The testimony further shows that on all previous occasions when the defendant had hauled material for the county, under direction of county officials, for the improvement of the highways, after delivery of the material, danger signals or lights were placed upon it by the county road supervisor. On September 2, 1917, at about one-thirty o'clock a. m. the morning following the delivery of the dirt, Mrs. Shepard, the plaintiff, at the invitation of a Mr. Husbands, a police officer, mounted and seated herself on the rear seat of a motorcycle at the corner of Second East and Second South streets in Salt Lake City. The motorcycle was then driven by Husbands south on the west side of State street toward Murray as far as Oakland avenue, where they ran into the dirt and rock thus left lying on State street, and were thrown from the motorcycle to the pavement. The plaintiff was seriously injured. The testimony further shows that during the night-time other motor vehicles ran into the same obstruction and were wrecked. The county road supervisor, when asked concerning why he had failed to place lights upon the material

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on the particular night in question, testified:

"Q. On this dirt that has been referred to in this case did you place red lights upon that dirt on the night of the accident? A. No, sir. Q. Why not, Mr. Smith? A. I forgot it. The first time that I forgot such a thing, but I forgot it that night."

The trial of the case was to a jury. At the conclusion of the testimony defendant moved for a directed verdict, whereupon the court directed, and the jury returned, its verdict, no cause of action.

The assignments of error relied upon by the plaintiff all challenge the action of the court in directing a verdict for the defendant. The question raised, therefore, on appeal is whether or not the defendant as a matter of law can be held, under the facts and circumstances as disclosed by the testimony, to answer for the damages sustained by the plaintiff in the accident.

This is the second time the case has been presented to this court for review. The first time by a unanimous court the order was made that the judgment of the district court be affirmed. Upon application of the plaintiff a rehearing was granted and the case re-argued. Upon the former hearing the plaintiff made the contention, and still contends, that the act of the defendant in hauling the dirt and dumping it upon the street was wrongful, that it thereby created a public nuisance, and that it must be held to answer in damages to any person who was injured thereby. In our former opinion we made the statement that—

"Leaving the rock and dirt upon the highway without danger signals or other precautionary methods taken to warn the traveling public of its presence constituted a public nuisance."

We then held that the act of the defendant in dumping the dirt from its cars, under orders from the county officials, for the purpose of improving and repairing the streets, was lawful, and as we then thought clearly pointed out that the wrong committed and the nuisance created was the leaving of the material in the street during the night-time without lights or other danger signals to warn travelers of its presence. It is the contention of the plaintiff that the hauling and dumping

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of the material on the highway by the defendant was not only wrongful, but the leaving of it there unguarded during the night-time following was negligence on the part of the defendant, although it was done as directed by the county officials, and the dirt was afterwards received and taken charge of by the latter. In support of this contention the plaintiff cites us the following authorities: *Bowen v. Detroit City Ry. Co.*, 54 Mich. 496, 20 N. W. 559, 52 Am. Rep. 822; *McDonald v. Toledo Consol. St. Ry. Co.*, 74 Fed. 104, 20 C. C. A. 322; *Brady v. Public Service Ry. Co.*, 80 N. J. Law, 471, 79 Atl. 287; *Dixon v. Brooklyn Ry. Co.*, 100 N. Y. 170, 3 N. E. 65; *Houston & T. C. Co. v. Lackey*, 12 Tex. Civ. App. 229, 33 S. W. 768; *Wilson v. West & Slade Mill Co.*, 28 Wash. 312, 68 Pac. 716; *Solberg v. Schlosser*, 20 N. D. 307, 127 N. W. 91, 30 L. R. A. (N. S.) 1111; 29 Cyc. 1201; Wood, Nuisances, section 875; *Morris v. Salt Lake City*, 35 Utah, 474, 101 Pac. 373; 13 R. C. L. section 190, p. 224; *Frank Bembe v. Commissioners of Anne Arundel Co.*, 94 Md. 321, 51 Atl. 179, 57 L. R. A. 279; *Hartford County v. Wise*, 71 Md. 52, 18 Atl. 31; *Ray v. Manhattan L. H. & P. Co.*, 92 Minn. 101, 99 N. W. 782; *Circleville v. Neuding*, 41 Ohio St. 465; *Philadelphia Coal Co. v. Barrie*, 179 Fed. 50, 102 C. C. A. 618; *Gillis v. Cambridge Gas Light Co.*, 202 Mass. 222, 88 N. E. 779; *City of Portland v. Richardson*, 54 Me. 46, 89 Am. Dec. 720; *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 495; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Robinson v. Mills*, 25 Mont. 391, 65 Pac. 114; *Shreve v. City of Ft. Wayne*, 176 Ind. 347, 96 N. E. 7; *Brooks v. City of Atlanta*, 1 Ga. App. 678, 57 S. E. 1081; Elliott, Roads and Streets (2d Ed.) section 648; *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; 13 R. C. L. p. 219, section 185; *Triay v. Richard Canal Co.*, 172 App. Div. 615, 158 N. Y. Supp. 739; *Elam v. City of Mt. Sterling*, 132 Ky. 657, 117 S. W. 250, 20 L. R. A. (N. S.) 512; *City of Louisville v. Tompkins*, (Ky.) 122 S. W. 174; *Dunlap v. Raleigh*, 167 N. C. 669, 83 S. E. 703; *Thornton v. Dow*, 60 Wash. 622, 111 Pac. 899, 32 L. R. A. (N. S.) 968; *First Presbyterian Cong. v. Smith*, 163 Pa. 561, 30 Atl. 279, 26 L. R. A. 504, 43 Am. St.

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Rep. 808; 1 Mechem on Agency, sections 1451, 1452; *Ellis v. McNaughton*, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. Rep. 308; *Baird v. Shipman*, 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Penn. Steel Co. v. Elmore* (C. C.) 175 Fed. 176; *O'Brien v. American Bridge Co.*, 110 Minn. 364, 125 N. W. 1012, 32 L. R. A. (N. S.) 980, 136 Am. St. Rep. 503; *Clifford v. Dam*, 81 N. Y. 52; 15 A. & E. Ency. Law, 501; *McDermott v. Conley*, 11 N. Y. Supp. 403<sup>1</sup>; *Hawver v. Whalen*, 49 Ohio St. 69, 29 N. E. 1049, 14 L. R. A. 828; *Bennett v. Lovell*, 12 R. I. 166, 34 Am. Rep. 628; *Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 396; *Topeka Water Co. v. Whiting*, 58 Kan. 639, 50 Pac. 877, 39 L. R. A. 90; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Lydecker v. Board of Chosen Freeholders*, 91 N. J. Law, 622, 103 Atl. 251, L. R. A. 1918D, 351; Comp. Laws Utah, sections 2840, 2845, 2520, 2823, 2735, 7240, and 2185.

<sup>1</sup> Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 58 Hun, 602.

The cases cited shed very little light on the questions involved in this action. All of these authorities announce and adhere to the well-established doctrine that one who wrongfully places or leaves an obstruction in a highway becomes liable to the persons sustaining injuries thereby. No criticism is to be made of the authorities cited and the principles announced by them, for they deal with unlawful acts and the liability of persons committing them, as contradistinguished from lawful acts committed in a lawful manner.

We held in our former opinion in this case that the acts of the defendant were lawful in removing the dirt from its road-bed and hauling and dumping it from its cars on the highway by direction of the county officials to be used for the improvement and repair of streets within the jurisdiction and under the supervision of the latter; that these acts of the defendant were not only lawful, but were performed in a lawful manner. Plaintiff did not before, nor does she now, cite us to a single authority holding that where the facts and circumstances are like or similar to those in the case we have under considera-



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tion here, in which negligence was held to be established and the defendant required to respond in damages.

By subdivision 24 of section 511, Comp. Laws Utah 1907, as amended by Laws Utah 1911, section 511x, p. 198, it is provided that the board of county commissioners shall have jurisdiction over the county roads, and the following powers:

"To lay out, maintain, control, erect, and manage public roads, turnpikes, ferries and bridges within the county outside of the incorporated cities. \* \* \*

By chapter 118 of Laws Utah 1909, entitled "Powers of county commissioners as to roads," it is provided:

"Sec. 1. Each board of county commissioners shall by proper regulations: 1. Appoint a county road commissioner. \* \* \* 2. Cause to be \* \* \* maintained and worked such public roads as are necessary for public convenience."

"Sec. 4. The county road commissioner, under the direction and supervision of the board of county commissioners, shall: 1. Take charge of the public roads within the county, and employ and direct such competent help as may be necessary to properly perform his duties. \* \* \* 4. Keep the roads clean of obstructions and in good repair. 5. Cause the roads to be graded \* \* \* and keep the same in repair and renew them when necessary."

The county officials have the lawful right to temporarily obstruct the highways under their jurisdiction for the purpose of making improvements and repairs, and this 2 right, when properly exercised, is always paramount to the right of the public in them for free and unobstructed travel. *Phelan v. Granite Bituminous Paving Co.*, 227 Mo. 666, 127 S. W. 318, 137 Am. St. Rep. 603; *R. C. L.* title "Highways," section 188; *Pinnix v. City of Durham*, 130 N. C. 360, 41 S. E. 932, 933; *Lund v. St. P., etc., Ry.*, 31 Wash. 286, 71 Pac. 1032, 61 L. R. A. 506, 96 Am. St. Rep. 906; *Stern v. Spokane*, 73 Wash. 118, 131 Pac. 476, 46 L. R. A. (N. S.) 620.

In the case before us the testimony clearly shows that the only acts the defendant was engaged in were the taking of the material from its roadbed, hauling and delivering it on State street to be received, taken, and used for the improvement of the public roads under the jurisdiction of county officials duly authorized and charged with the duty of supervising

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ing and keeping them in proper repair. The delivery of the material by the defendant at the time and place where it was delivered was not negligence per se. The only wrong that contributed to the plaintiff's injuries, and the only negligence of which she has any right to complain, was the neglect of the county in leaving the material on the highway during the night-time unguarded, without warning signals or other means of apprising the public of its presence in the street. The duty of safeguarding the public after the defendant had removed the material from its roadway and had hauled and dumped it from its cars in a lawful manner and it had been received and taken charge of by the county for a lawful 3 purpose devolved upon the county. Further, the testimony is clear that after the material was dumped from the defendant's cars defendant had no further control or supervision over it. It necessarily follows that if the defendant delivered it in a lawful way and at a lawful place, and it was then received and taken charge of by the county, the responsibility of the defendant ended. Moreover, after the county had thus received and taken charge of the material the defendant would have no legal right to control it or exercise dominion over it even had it assumed to do so.

On principle we are unable to distinguish between a street car company delivering material to the legally authorized county officials directly engaged in the repair and improvement of the county highways within their jurisdiction (upon whom rests the statutory duty to "take charge of public roads" and "keep the roads clear of obstruction and in good repair") and the laborer who performs his work in a lawful manner or the merchant or materialman furnishing and delivering tools and material in a lawful way for the improvement of the public highways. Throughout this state at the present time thousands of men are employed in digging and plowing up the highways; many teamsters are engaged in hauling and delivering sand, rock, cement and other materials upon them; machinery and other equipment are being sold and delivered by merchants at points designated, all to be used in and for the improvement of the public roads. This

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work is being officially directed by the respective city, county, and state officials who determine when, where, and how the work is to be performed and the materials and equipment furnished. If the employés complete their work in a lawful way and it is afterwards received and taken charge of by their employers, upon what logical basis may the former be held responsible for the injuries occasioned to the traveling public in cases of accident through failure or neglect of their employers to seasonably remove it from the highways or in leaving it and failing to place warning signals upon it, or to make lawful use of it thereafter? There is no principle of law that permits of penalizing lawful conduct. To hold the employés responsible to third parties for injuries received by them through the neglect and failure of their employers after the relationship of employer and employé has terminated would be, in our judgment, neither sound law, correct in principle, nor calculated to promote justice.

We do not wish to be understood as holding, nor do we hold, that work performed on the public highways is an unlawful manner or for no lawful purpose is to be justified in the law, although performed under the direction of authorized officials. What we do hold is that a lawful act performed in a lawful way cannot create a nuisance, nor will it give rise to an action in tort. The hauling and delivery of the dirt in the street were performed in a lawful way, and these acts of the defendant most certainly should not be held a nuisance. 4

But the plaintiff strenuously contends that the act of the defendant in delivering material on State street to be used on Oakland avenue was a wrongful act; that while it is permissible under the law to temporarily obstruct the highways for the purpose of making improvements and repairs the rule cannot be extended so as to permit the depositing of materials on one highway for the improvement of another. No case in which this question was directly before the court is cited in plaintiff's brief. The case cited (*Louisville v. Tompkins*, *supra*), upon which plaintiff seems to rely, announces the doctrine, but in that case the question was not properly raised,

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and was not before the Kentucky court to pass upon. We need not therefore regard that case as a precedent. However, let it be conceded, without our deciding it, that the rule contended for by plaintiff, generally speaking, is a proper one, yet it should not be invoked nor followed in a case in which there is no sound reason to be assigned for doing so. We do not think the rule should be applied in any event in the case before us. State street and Oakland avenue, as pointed out in the testimony, were in the same road district and under the control and supervision of the same county officials. The testimony further shows that both of these highways at the time of the accident to the plaintiff were being improved at the same time by the taking of material from State street to be used in the grading of Oakland avenue. State street was a wide street traversed by the defendant's railway, which afforded the very best facilities for the removal of the dirt from its roadway and hauling it to a point on State street where it could be taken and used for the improvement of Oakland avenue. Oakland avenue was a narrow street, without railway trackage intersecting State street. Under these circumstances and conditions we are not prepared to say that the depositing of the dirt on State street to be taken and used by the county officials on Oakland avenue constituted a public nuisance, or that the placing of it there was unlawful in its inception. We think, under the circumstances, it was not only the most practicable and feasible way of hauling the material, but that the county officials who were charged with the statutory duty of improving these streets exercised good judgment in having the dirt hauled and placed on State street at a point where it was available for taking and using it for the improvement of Oakland avenue. Moreover, the county officials had the lawful right to temporarily leave the material upon State street for the purposes for which it was to be used on Oakland avenue. The wrong committed was the leaving of the material during the night-time upon the highway by the county after it had been rightfully received at the hands of the defendant without placing danger signals upon it. The dirt on the highway did not become a nuisance by any act or omission of the de-

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fendant, nor while the defendant had any power or control over it.

We have carefully considered the many cases to which we are cited by plaintiff's brief, but we have not paused to discuss them for the reason that the principles of law they announce are applied to facts and circumstances entirely different from those we have under consideration in the case at bar. After carefully reviewing the authorities cited and the principles of law they announce, we feel convinced that they cannot properly be applied to the facts and circumstances of the case at bar and under which the plaintiff seeks to recover damages at the hands of the defendant.

It therefore follows that the order of the district court directing a verdict for the defendant was right, and the judgment entered thereon should be affirmed, with costs to defendant. It is so ordered. It is further ordered that the foregoing opinion be substituted for the former opinion hereinbefore referred to, and this opinion shall be the opinion officially published.

THURMAN, J., concurs.

FRICK, J.

After considerable hesitation, and, I may say, with some reluctance, I am forced to the conclusion that the Chief Justice is right. In concurring in the former opinion I did so upon the sole ground that, the county being immune, therefore the defendant was likewise so. I am now convinced that my conclusion in that regard was erroneous, and that the immunity of the county afforded the defendant no protection if it, as a matter of law, can be held liable. The difficulty that confronts me, however, is to find authority in law for holding the defendant liable. It is quite true that the law is well settled that "an individual who erects *an unlawful obstruction* to the free use of a highway, in its nature a nuisance, *by reason of his wrongful act* is charged in law as an insurer against accident to a person properly traveling the highway

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and meeting injury by reason of such unlawful obstruction.

\* \* \* But where the highway is obstructed under license and by authority, the person responsible for such obstruction is chargeable only with ordinary care to see that such obstruction does not become a cause of injury to any person lawfully traveling the highway." (*Italics mine.*) *Stockton Automobile Co. v. Confer*, 154 Cal. 405, 97 Pac. 883. It is manifest that the defendant does not come within the first sentence of the foregoing quotation. Its act in depositing the dirt on the traveled portion of the highway was not an unlawful act. That, it seems to me, is too clear to require argument. Does it come within the second sentence? For a long time I was under the impression that it did. Upon careful reflection and consideration, however, I was forced to abandon that impression also. Had the defendant been engaged in improving or repairing the highway as an independent contractor it no doubt would come within the proposition of law stated in the second sentence before quoted. It was, however, merely acting as the instrumentality of the county in depositing the dirt, and was therefore not "responsible for such obstruction." Moreover, the dirt was deposited for a lawful purpose and at a place the county officials had a right to have it deposited for the purpose of improving or repairing that or any other highway in the immediate vicinity. There was therefore nothing unlawful in defendant's act. Nor did such act in any way invade any rights of the plaintiff. While it is true that in the absence of any warning the plaintiff had the right to assume that the highway was free from obstructions, yet it is also true that the county officials had a legal right to deposit the dirt thereon for the purpose of repairing or improving the same or any other highway in the immediate vicinity. In doing that, however, it became the duty of the county official who was in charge of the work to withdraw either the whole or, at least, a portion of the highway from travel so as not to mislead the traveling public. In this instance a signal or warning sign sufficient to apprise the traveler of the obstruction would have been a compliance with the duty that the law imposed. The accident in this case was due

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entirely to the failure to warn the plaintiff of the obstruction. That failure, therefore, was the proximate cause of plaintiff's injury. In view that the county had the lawful right to direct the defendant to deposit the dirt, and that the defendant's acts were lawful in doing so, and that it was not the act of depositing the dirt, but the failure to put up a signal or warning sign, which was the cause of plaintiff's injury, I cannot see how the defendant's act in depositing the dirt can be said to be the proximate cause of the injury. If in this case the county were not immune no one would for a moment hesitate to say that if any one is liable it is the county. In view that the acts of the defendant in depositing the dirt were lawful, it, as I view it, becomes entirely immaterial whether the county is immune or not. The mere fact that the county cannot be sued affords no excuse to the officer upon whom the law imposed the duty of putting up a warning signal or sign in case he was required to leave the dirt upon the traveled portion of the highway longer than he had expected. Had the defendant's act in depositing the dirt been for its own convenience in repairing the highway it would have been its duty to see that proper signals or warning signs were put up to warn the traveler against the obstruction. The dirt was, however, deposited for the convenience of the county and upon the direction of the official in charge of the work, and was lawfully deposited. I therefore cannot see how the defendant can be said to be a wrongdoer in any particular. Under the circumstances the defendant could not have withdrawn the highway from travel. It had no authority over it whatever. To do that was the duty of the county official who directed the work. He failed to do so, and hence his act of omission lies nearest the injury. His omission was in no way connected with the defendant's act in depositing the dirt in the first instance, but was an independent intervening act. I concur, therefore, upon the sole ground that in this case the defendant's acts were no different than would have been the act of any other employé of the county who was directed by the officer in charge of the work to deposit the dirt at the place it was deposited, and that it was not the duty of such employé to put up signals or warning signs.

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GIDEON, J. (dissenting).

The controlling question for determination in this case, as I view it, is: Did the county commissioners of Salt Lake county, as the custodians of the public highways in said county, have the lawful right to direct the defendant company to dump dirt from its cars upon State street to be used in the repair of Oakland avenue, a street running at right angles with said State street?

I concurred in the former opinion affirming the judgment of the district court with some doubt as to the correctness of the conclusions reached. After the reargument and a further examination of the authorities, and of the principles which, in my judgment are involved, I am convinced that the former decision ought not to stand as the law of this case.

It is conceded that the county commissioners of this state have control of the public highways in their respective counties. The purpose of the law delegating that authority and duty is that some public officer or commission shall be charged with the duty of keeping the highways in repair for the public convenience and travel. It may also be admitted as a legal proposition that the county commissioners have the right to temporarily obstruct any highway for the purpose of making public improvements and all needed repairs. Otherwise the very object sought by granting the power would be defeated, namely, the duty to keep the highways suitable for travel. Keeping in mind the purpose for which highways are constructed and kept in repair, namely, for the safety and convenience of the public traveling on said highways, it must logically follow that public officers charged with the duty of keeping such highways in repair, in the performance of that duty, must so perform their respective duties as not to trespass upon or interfere with the rights of the public to any greater extent than is absolutely necessary for such improvements. Repairing highways is a duty imposed by law, and no right exists in a public official to obstruct a highway except as the same is necessary to perform the duty of repairing such highway. No one will contend that it was absolutely neces-



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sary to dump the dirt in question upon State street for the repair of Oakland avenue. True, it was probably more convenient, but an absolute necessity did not exist. That, in my judgment, is the error of the majority opinion. The right of the plaintiff to travel upon State street and to assume that it would be reasonably safe for travel is made subservient to the convenience of the commissioners in the performance of their duty to repair Oakland avenue.

It is admitted that the dirt dumped by the defendant company from its cars upon State street was not to be used for the repair of that street, but was to be used in repairing Oakland avenue, and that fact was known to the company at the time. It is not contended that the defendant company had any right to deposit the dirt on said street except by and under the arrangement with the county commissioners who assumed to grant it such right. If the commissioners were not lawfully exercising a power vested in them, then the defendant company, by throwing the dirt upon such street along a part of the street used by the public, was thereby acting without lawful authority. If such be the fact I can see no escape from the conclusion that of necessity the defendant company would be liable for any injury caused by such obstruction to any one traveling upon that highway, unless such injury resulted from some act of negligence of the party injured or some other person for whose conduct or acts such injured person is responsible. If the county commissioners were not lawfully exercising their authority in so obstructing State street, then it must follow that the defendant company was not doing a lawful act at the time it unloaded the dirt upon that street. The commissioners being without right or legal authority to so obstruct the street, it necessarily follows that the agent directed by such principal cannot justify its acts and absolve itself from liability by relying upon and pleading the unauthorized act of the party or person who directed such unlawful act. 1 Mechem, Agency (2d Ed.) section 1455; *Baird v. Shipman*, 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504; *Ellis v. McNaughton*, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. Rep. 308; note 32 L. R. A. (N. S.) 972.

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The county commissioners, in my judgment, in directing and authorizing the defendant company to unload its cars on State street, were violating one of their primary and fundamental duties. That is, they were obstructing a public traveled street without any justification or legal right so to do. State street was not to be repaired, and, as far as shown by the record, that particular place was not required to be repaired for the public convenience.

The authorities relied on by respondent do not, in my judgment, justify or support its contention. The authorities cited simply announce the general rule that public officials have the right to make needed repairs and for that purpose to obstruct a highway even at the inconvenience of the public. No one disputes that proposition. As pointed out, that would simply be performing a public duty. No authority is cited holding a defendant free from liability under facts similar to the facts shown in this case.

The authorities relied on by appellant possibly do not discuss facts similar to the facts involved here. In *City of Louisville v. Tompkins* (Ky.) 122 S. W. 174, the court seems to have accepted as elementary the rule that the public officials have no right to place material on one street or highway to be used in repairing another street or highway. In principle, in my judgment, that must be so. The officials are required to keep the highways free from obstruction so as not to interfere with the convenience of the traveling public, and the only exception to that rule is when it is necessary to close or obstruct a highway while making needed repairs or making public improvements.

I am unable to follow the reasoning whereby it is concluded that by depositing the dirt upon State street the defendant company did not invade the rights of the public, including plaintiff. The highway was there, and the plaintiff had the right to travel it and to assume that it was in a reasonably safe condition for travel. By the defendant's acts the highway was rendered dangerous. Now, how can it be said that the plaintiff's rights were not invaded? The defendant does not, as I understand its position, so contend. It claims only

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that it acted under direction of the officials having control of the highway, and for that reason it cannot be held liable for the injury which resulted, not that its acts were not an invasion of plaintiff's rights.

It is also claimed that to hold the defendant company liable under the facts as disclosed by this record would of necessity make any one liable, even an ordinary teamster who might haul a load of sand and dump it upon the street in front of some citizen's residence when he was directed to so do by the owner of the property whose property or sidewalk was to be repaired, for which purpose the sand was to be used. Conceding that such would be the result, is there any logical reason why a teamster who, without authority, invades the rights of another and injury results should be held free from liability?

The right of the plaintiff to travel upon the highway when the injury occurred cannot be and is not disputed. That right was invaded or obstructed by the dirt thrown upon the highway by the defendant company. The justification for such trespass is, in my opinion, based on an unauthorized and illegal act of a public official. That ought not to be held a defense. State street is the main public highway running south from Salt Lake City to Murray City and other towns in the southern part of Salt Lake county. There are many other highways intersecting it from the east and west. To apply the results of the majority opinion to the facts as they exist would give the defendant company and the county officials the right to dump materials on State street for the improvement of all intersecting streets along defendant's line of railway on State street. In other words, respondent and the county officials could rightfully and lawfully use State street between the southern limits of Salt Lake City and the southern boundary of the county as a station or dumping ground from which to haul material to all parts of the county, however remote.

In *Wilson v. West & Slade Mill Co.*, 28 Wash, 312, 68 Pac. 716, the Supreme Court of Washington has stated the rule of law governing the duty and liability of parties obstructing a

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highway under circumstances similar to those in the case at bar in the following language:

"One who, by himself, or jointly with another or others, places an obstruction in a public street, is in law under an obligation to remove it, and is liable for any damage occasioned thereby during the continuance of the obstruction. The fact that he may have no interest in its maintenance after its creation does not relieve him from such liability."

See, also, 13 R. C. L. p. 224, section 190.

In my opinion the judgment of the lower court in this case should be reversed, and a new trial granted. I therefore dissent.

WEBER, J., concurs with GIDEON, J.

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### ROE v. SCHWEITZER.

No. 3285. Decided October 18, 1919. (184 Pac. 938.)

1. TRIAL—OFFER OF PROOF STANDS IN SAME POSITION AS PLEADING. An offer of proof stands in the same position as a pleading, and if it is in any sense contradictory it will be construed when presented against him who relies upon it. (Page 210.)
2. EVIDENCE—EXTRINSIC PROOF INADMISSIBLE TO DISCHARGE AGENT FROM PERSONAL LIABILITY. In an action to recover from an officer of a gold mining company \$200 paid to him for stock, for which he receipted individually and without designation as such officer, extrinsic proof that he acted in an official capacity was not admissible to discharge him from liability. (Page 212.)

Appeal from District Court, Third District, Salt Lake County; *J. Louis Brown*, Judge.

Action by J. E. Roe against Thea Schweitzer. From judgment for plaintiff, defendant appeals.

AFFIRMED.

*King, Straup, Nibley & Leatherwood*, of Salt Lake City, for appellant.

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*Olson & Lewis*, of Salt Lake City, for respondent.

STEPHENS, District Judge.

In this case the respondent brought an action against the appellant in the district court of the Third judicial district for Salt Lake county, Utah, to recover \$200, alleged to have been paid to the appellant for 200 shares of the capital stock of the Fine Gold Placer Mining Company. The assertion of the respondent was that the appellant had failed to deliver the stock upon demand after full payment of the \$200. At the trial of the cause, the respondent introduced in evidence the following instrument:

"Plaintiff's Exhibit 1.

"December 15th, 1913.

"Sold to J. E. Roe two hundred shares Fine Gold Placer Mining Company's capital stock at 1 (\$1.00) dollar per share, to be paid at the rate of \$50.00 per month.

"Thea Schweitzer.

"Dec. 15/13. Recd. this date fifty dollars (\$50.00).

Thea Schweitzer.

"Jan. 15/14. Recd. this date forty dollars (\$40.00).

Thea Schweitzer.

"Feb. 19/14. Recd. this date sixty dollars (\$60.00).

Thea Schweitzer.

"July 18/14. Recd. this date twenty-five (\$25.00) dollars.

Thea Schweitzer.

"Aug. 17/14. Recd. this date twenty-five (\$25.00) dollars.

Thea Schweitzer."

Thereafter the respondent proved payment of the \$200, and rested. The appellant then opened his case, testified that when Exhibit 1 was made out by the parties they had "considerable conversation," and was then asked the following question:

"Now state whether or not anything was said to you at that time by Mr. Roe relative to where or how he wanted this stock delivered; answer that 'Yes' or 'No.'"

To this question the respondent interposed the objection that it was irrelevant and immaterial, unless it sought to vary the terms of the written Exhibit 1, and that, if it did tend so to vary the terms of Exhibit 1, it was incompetent. The court,

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treating the question as one calling for the utterance itself, as distinguished from the fact of utterance, sustained the objection. Thereafter the appellant, according to the practice of making a record for appeal by offering, after an adverse ruling, the proof claimed to be excluded by the ruling, made the following offers of proof (because of their importance to the point in this appeal they are quoted from appellant's abstract in extenso; the reference in the first offer to "the hundred shares of stock" relates to a point not material upon this appeal) :

"I offer to prove by this witness that at the time the memorandum introduced in evidence in this case was made and delivered to the plaintiff, that the plaintiff had prior negotiations with this defendant for the purchase of stock of the Fine Gold Mining Company, and that in the purchase of the stock—of the hundred shares of stock, I understood it is admitted he got that—he purchased it in the same way, and took a receipt from the defendant, and received his stock from the Fine Gold Placer Mining Company; that at the time and on the date on which this memorandum of agreement was drawn up and delivered, to wit, the fifteenth day of December, 1915, that the plaintiff specifically requested and demanded of the defendant in this case that he simply turn the money over to the company, make provision there for the delivery of the stock to the plaintiff when it should be paid for; and we further offer to prove by this witness that in compliance with that request and demand upon the part of the plaintiff, that the money, as it was paid in was promptly turned over to the treasurer—the treasurer of the Fine Gold Placer Mining Company—and was deposited in the bank by that company, and that the records of the company show that the money was received. We further offer to prove by this witness that after the receipt of the last payment the Fine Gold Placer Mining Company stood ready and willing at all times to deliver to the plaintiff 200 shares of stock; that all that was done with reference to depositing the money as it was paid into the company was simply to perfect title to the stock on the part of the defendant, and put it in a position to be delivered immediately to the plaintiff upon his presentation of the receipt, which was simply for the purpose of showing that in paying, and to show the Fine Gold Placer Mining Company that the delivery was to be made as indicated. We further offer to prove by this witness that this arrangement was consented to by the Fine Gold Placer Mining Company, and that they simply as a matter of accommodation, and at his request, were ready to deliver it to the plaintiff—the stock after it was paid

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for. We further offer to prove by this witness that soon after the payment for this stock that the Fine Gold Placer Mining Company recognized, in substance and effect, that the plaintiff was the owner and holder of 200 shares in addition to the 100 shares which he already had of the capital stock; that the plaintiff participated."

"I offer to prove by Dr. C. N. Ray, of this city, who, at the time of the transaction in question, was a resident physician of Bingham Canyon, Utah, that he was the secretary of the Fine Gold Placer Mining Company, and that immediately after the payment of the last money due under the memorandum of agreement, that he stood ready and willing to deliver to the plaintiff 200 shares of the capital stock of the Fine Gold Placer Mining Company in controversy in this action, and that at all times the stock was in readiness and condition to be delivered to the plaintiff upon his presenting the receipt for the full payment."

"I now offer to show by Mr. A. E. Custer, a witness now present in court, that he was the president of the Fine Gold Placer Mining Company, and that as such president he stood ready and willing as the executive officer, the head of the corporation known as the Fine Gold Mining Company, to deliver to Mr. Roe, the plaintiff in this action, the 200 shares of capital stock referred to in the memorandum of agreement in this action, at any time after the payment for the same by the plaintiff upon the presentation of the receipt of Mr. Schweitzer showing that the money had been paid; in other words, that the company, for and on behalf of Mr. Schweitzer, through Mr. Custer as its president, and Dr. C. N. Ray as its secretary, held and stood ready and willing to deliver to him the stock which he had requested from the defendant."

These offers being rejected by the court, the appellant rested, and the court then directed a verdict in favor of the respondent. To these rulings, and to the direction of a verdict, the appellant duly excepted, and upon such rulings and direction of verdict, as well as upon the denial of a motion for a new trial, he assigns error. It is the contention of the appellant that by the rulings of the trial court he was denied the right to show an agreement, extrinsic to Exhibit 1, relating to place of delivery of the stock sold, and that he had that right under the view that Exhibit 1 is an incomplete writing.

If the offers of proof made by the appellant could be said to concern an extrinsic agreement upon a place of delivery, a subject upon which Exhibit 1 is silent, it would be proper

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and necessary here for the court to state the law relating to extrinsic proof where writings are asserted to be incomplete; that is, where it is contended that their "legal act" has not by the parties been "reduced into a single memorial," so that "all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act." Wigmore on Evidence, vol. 4, section 2425. But the offers of proof do not concern place of delivery. Therefore any statement of the law upon the point just mentioned would be obiter here.

Examination of the offers of proof shows them to concern not place of delivery, the subject upon which Exhibit 1 is silent, but the capacity in which the appellant was acting at the time of the execution of Exhibit 1. Upon this subject Exhibit 1 is not silent. On the contrary, it expressly and definitely, without even *descriptio personæ*, shows the appellant to have signed in a personal, not a representative, capacity. In substance and effect the offers are offers to prove that the appellant was acting, at the time of the execution of Exhibit 1, not as seller, but as agent to sell. That is, the probative effect of the testimony offered, had it been received, would have been that of showing that, notwithstanding the fact that the appellant signed Exhibit 1 in his personal capacity, he was nevertheless in reality acting in a representative capacity, so that the real seller was the Fine Gold Placer Mining Company, and the appellant only an agent thereof. The following points would have been established if the proof offered had been received: That the money paid to the appellant was not to be retained by him, but was to be turned over to the Fine Gold Placer Mining Company; that the money, as paid, was in fact turned over to the treasurer of the Fine Gold Placer Mining Company, and deposited in the bank by that company; that it was credited to the respondent on the books of the company; and that the Fine Gold Placer Mining Company stood ready, after the receipt of the last payment, to deliver the stock to the respondent. Nothing except express use of the terms "principal" as applied to the Fine Gold Placer Mining Company, and "agent" as applied to the ap-



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pellant, could characterize more clearly than these points offer to show it to have been known that the appellant was merely an agent to sell, not a seller in his own right. The Fine Gold Placer Mining Company was to get, and, according to the proof sought to be introduced, did get, the respondent's money. The respondent was to get the stock directly from the Fine Gold Placer Mining Company. If the appellant was seller in his own right, why not also retainer of the purchase money? If the Fine Gold Placer Mining Company was but bailee to hold for delivery, why also ultimate retainer of the purchase price? There is one phrase in the offers, " \* \* \* that all that was done with reference to depositing the money as it was paid into the company was simply to perfect title to the stock on the part of the defendant (appellant) and put it in a position to be delivered immediately to the plaintiff upon his presentation of the receipt, which was simply for the purpose of showing that in paying, and to show the Fine Gold Placer Mining Company that the delivery was to be made as indicated" which might be taken as an offer of proof that the appellant was himself and in his own right purchasing from the Fine Gold Placer Mining Company, and then reselling the same stock to the respondent, and at the same price (itself an improbable construction of a business contract of sale); but that meaning is upset by the offer to show that the money as paid was credited to the respondent. If the appellant was purchaser in the first instance, the price paid would surely have been credited to him. There is a phrase in the offers, "in other words, that the company, for and on behalf of Mr. Schweitzer, \* \* \* held and stood ready and willing to deliver to him (respondent) the stock which he had requested from the defendant," which, were it not for the plain contrary meaning of the balance of the proof offered, might be taken to indicate an agency in the Fine Gold Placer Mining Company, or that that company was a gratuitous bailee to hold the stock for delivery. And the phrase, "this arrangement was consented to by the Fine Gold Placer Mining Company, \* \* \* and they, simply as a matter of accommodation and at his request, were ready to

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deliver to the plaintiff (respondent) the stock after it was paid for," might give rise, taken alone, to a similar inference. But from the standpoint of exactitude these are dangerous phrases. "For and on behalf of" is at least a mixed question of law and fact. And what was the scope of the "arrangement" to which there was "consent"? The term "arrangement" is broad. It must be taken to include the ultimate payment to the Fine Gold Placer Mining Company of the purchase price, a point which seriously weakens the idea of proof of a gratuitous bailment. And in any event, allowing such phrases full face value, they do not overbalance the heavy counterweight of the rest of the proof offered upon the same subject. "An offer must be judged exclusively by its specific contents regarded as a whole." Wigmore on Evidence, vol. 1, section 17b. And note that while three witnesses were offered here, they were all offered upon the same subject, so that in legal effect there is but one offer. An offer of proof stands, moreover, in the same position as a pleading. If it is in any sense contradictory it will be construed, when presented against him who relies upon it. There seems to the court, finally, nothing in the offers which, if received, would have substantiated the contention of the appellant, as argued under an analogy, that the situation was one where goods sold under a memorandum were by oral agreement to be taken by the seller to the place of business of a third party and there left for the buyer. It does not appear from these offers that the stock sold was in the possession of the seller (appellant), and by him actually taken to the place of business of the Fine Gold Placer Mining Company. On the contrary, it fairly appears from the offers that the stock always was in the possession of the Fine Gold Placer Mining Company. No mention is made of specific certificates being in the hands of the appellant. Indeed, certificates, as such, are not mentioned in the offers at all, though the word is once used in the amended answer referred to below.

If there were any doubt upon the face of the offers themselves that they would have had the effect of proving, not an extrinsic agreement concerning place of delivery, but that

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the appellant was only an agent, not personally interested in the sale, that doubt would be completely dissolved by paragraphs I, II, and IV of appellant's amended answer, wherein it is alleged as follows (the italics are the writer's) :

"I. That at the time said two hundred shares of the capital stock of the Fine Gold Placer Mining Company were sold to this plaintiff by defendant, and that *notwithstanding the fact that said memorandum of sale was signed by this defendant personally*, that it was understood by and between plaintiff and defendant that as payments were made for said stock that defendant would give plaintiff a receipt for the same, and that when the full amount was paid plaintiff would present his receipt to the Fine Gold Placer Mining Company, and receive his said two hundred shares of stock; and it was further agreed and understood, by and between plaintiff and defendant at the time said stock was purchased, that defendant would pay to the Fine Gold Placer Mining Company all money received by him from plaintiff as the same was paid; and defendant further alleges that plaintiff fully understood and agreed to present his receipt to said company, and receive said two hundred shares of stock as referred to in said receipt.

"II. Defendant further alleges that all payments received by him from plaintiff in payment for said stock to the full amount of \$200 was promptly paid by defendant to the Fine Gold Placer Mining Company at the several times when said payments were received by the defendant from the plaintiff, and defendant further alleges that the plaintiff was at said times credited upon the books of the Fine Gold Placer Mining Company with the several amounts so paid in to the full amount of \$200, and that the plaintiff was further credited with stock upon the books of said company to the full amount of two hundred shares, which said stock was subject to plaintiff's order, and to be delivered to plaintiff upon the presentation of his receipt showing payment for the same."

"IV. *Defendant further alleges that he received no benefit or profit whatsoever as a result of the sale of said stock to this plaintiff*, and defendant is further informed and believes, and upon such information and belief alleges, that at all times since plaintiff paid for said stock he could have had a certificate for the same by presenting his receipt to the Fine Gold Placer Mining Company, as plaintiff agreed to do."

Note respecting this answer this point: That it does not say, "*notwithstanding the fact that said memorandum of sale was left silent as to delivery* it was nevertheless understood

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and agreed that delivery should be made at the place of business of the Fine Gold Placer Mining Company," or words to such effect; it says, "notwithstanding the fact that said memorandum of sale was *signed by this defendant personally* that it was understood and agreed by and between plaintiff and defendant, \* \* \*" and thereafter it is alleged that the money was to be paid ultimately to the Fine Gold Placer Mining Company, that the stock was to be received from that company, that the money was so paid, that the defendant "received no benefit or profit whatsoever as a result of the sale" of the stock, and that the plaintiff (respondent) could have had a certificate by presenting his receipt to the Fine Gold Placer Mining Company. This seems to the court a clear case of pleading that, though the appellant signed in a personal capacity, he was only an agent. Therefore the proof offered must have been to that effect or at variance with the pleading. Note especially that the allegation that the defendant (appellant) "received no benefit or profit whatsoever as a result of the sale" of the stock is consistent with the allegation that the Fine Gold Placer Mining Company ultimately received the purchase money, and is consistent with the theory that that company, not the appellant, was the seller, and is inconsistent with the theory that the appellant was the seller, and the Fine Gold Placer Mining Company merely an agent, or bailee, to deliver.

From the conclusion thus compelled, that appellant's offers of proof concern, not place of delivery, but the capacity in which the appellant was acting at the time of the execution of Exhibit 1, it necessarily follows that the action of the trial court in rejecting the proof, directing a verdict, 2 and denying the motion for a new trial was correct. The law is well settled that where an agent has signed a contract in a personal capacity—that is, executed it in a manner clearly indicating that the liability is his alone—extrinsic proof is not admissible to discharge him from liability upon it. If he personally is, in unambiguous terms, bound to fulfill, he must fulfill. *Higgins v. Senior*, 8 M. & W. 834; *Fisher v. Marsh*, 6 B. & S. 411, 416; *Cream City Glass Co. v. Fried-*

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lander, 84 Wis. 53, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St. Rep. 895; *Western Publishing House v. Murdick*, 4 S. D. 207, 56 N. W. 120, 21 L. R. A. 671; *Nash v. Towne*, 72 U. S. (5 Wall.) 689, 18 L. Ed. 527; *Bulwinkle & Co. v. Cramer and Blohme*, 27 S. C. 376, 3 S. E. 776, 13 Am. St. Rep. 645; *Rapid Safety Filter Co. v. Lautkin*, 167 N. Y. Supp. 376; Wigmore on Evidence, vol. 4, section 2438 (3); Jones Commentaries on Evidence, vol. 3, section 452. The doctrine of *Pym v. Campbell*, 6 El. & Bl. 369, and *Rogers v. Hadley*, 2 H. & C. 226, that it can be shown that a writing was not intended by the parties to have effect as a contract, is not here applicable.

It is unnecessary to comment upon the authorities cited by the appellant. They do not concern the rule stated above.

The judgment is **AFFIRMED**; costs to the respondent.

WEBER, J., being disqualified, did not participate herein.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

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CHANDLER v. INDUSTRIAL COMMISSION OF UTAH  
et al.

No. 3395. Decided November 7, 1919. (184 Pac. 1020.)

1. **MASTER AND SERVANT—WORKMEN'S COMPENSATION; ARISING OUT OF EMPLOYMENT INCLUDES DOG BITE.** Where an employé on his way from his residence to a garage to get his employer's automobile, used in making deliveries, was bitten by a dog while making delivery of meat for his employer, which was undelivered the evening before the injury arose "out of the employment" within Comp. Laws 1917, section 3122, allowing compensation for injuries by accident arising out of and in course of the employment. (Page 216.)
2. **MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT MUST BE LIBERALLY CONSTRUED.** The rule that Employers' Liability Act, providing for compensation for injuries, should be liberally construed, which is also the rule prescribed by Comp. Laws

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1917, section 5839, applies especially to the phrase "out of and in the course of the employment." (Page 217.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION; DOUBT RESOLVED IN FAVOR OF CLAIMANT. Any doubt respecting right to compensation should be resolved in favor of the claimant. (Page 218.)

Appeal from District Court of Weber County, Second District; A. W. Agee, Judge.

Proceedings for compensation under the Employers' Liability Act by Emma Chandler opposed by A. M. Miller and the Aetna Life Insurance Company. Claimant's application was denied, and she commenced proceedings in the district court against the Industrial Commission, Miller, and the Insurance Company.

Judgment dismissing action, and claimant appeals.

REVERSED and REMANDED, with directions.

*Chez & Barker*, of Ogden, for appellant.

*De Vine, Stine & Gwilliams* and *J. D. Murphy*, all of Ogden, for respondents.

FRICK, J.

The plaintiff made application to the Industrial Commission of this state under the Employers' Liability Act of this state to recover compensation for the death of her husband, which occurred as hereinafter stated. The Industrial Commission denied her application for the reasons hereinafter appearing, and, pursuant to the provisions of the act aforesaid, she commenced this proceeding in the district court of Weber county.

In her complaint, after stating the necessary jurisdictional facts and matters of inducement, she alleged:

"That on the 26th day of January, 1918, at Ogden, Utah, one

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George C. Chandler was engaged in the employ of A. M. Miller. That the said A. M. Miller was on said date conducting and operating a meat and grocery store in said city, doing business under the name and style of 'Washington Market.' That on said date, and at the said time and place, the said A. M. Miller, in the conduct and operation of said business, employed more than four persons, to wit, about forty persons, and had elected to become and was subject to the provisions of chapter 100 of the Laws of Utah of 1917, an act passed by the Legislature of the state of Utah on March 8, 1917, creating the Industrial Commission of Utah, and among other things establishing rates of compensation for personal injuries or death sustained by employes in the course of employment, and providing methods of insuring the payment of such compensation.

"That the duties of the said George C. Chandler required him to deliver meat and groceries in the city of Ogden, Utah, with and without an automobile, and that he was on the date and at the time and place herein mentioned furnished an automobile by his employer, the said A. M. Miller, for use in making such deliveries, which were made with an automobile, and that the hours of his said employment were from seven o'clock A. M. until 6 o'clock P. M.; that is to say, he was required to commence his said employment at seven o'clock A. M. and continue until 6 o'clock P. M. That the certain automobile which was furnished to him by his said employer for use in making such deliveries which were made with an automobile was kept in a garage at the rear of the residence of his said employer, A. M. Miller, at 764 Twenty-Fifth street, Ogden, Utah. That the place of business of the said A. M. Miller was situated at 2472 Washington avenue, Ogden, Utah. That the place of residence of said George C. Chandler was in the rear of Twenty-Seventh street between Jefferson and Adams avenues, Ogden, Utah. That in the course of his said employment the duties of the said George C. Chandler required him to go from his family residence each morning to said garage, and get said automobile, and drive it down to the said place of business of the said A. M. Miller, and to use it throughout the day in making such deliveries and to return it to the said garage at night after his day's work was finished. That when he was unable to make all the deliveries of the day he would bring with him to his home such undelivered packages and make deliveries of them the following morning on his way to his work.

"That on the morning of January 26, 1918, at about 7:20 o'clock, while the said George C. Chandler was on his way from his place of residence to the said garage to get said automobile and drive it down to his employer's said place of business to begin making the daily deliveries which he was required to make as herein-

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before alleged, and while making delivery of meat for his employer which was undelivered the evening before, and without fault on his part, he was attacked and bitten in his hand by a dog known as the Jefferson Avenue dog. That after having his wound dressed he proceeded to his daily work, and worked steadily on each and every work day thereafter until on or about the 22d day of March, 1918, when he became violently sick, and was removed to a hospital, where he died on or about the 25th day of March, 1918, a violent death from hydrophobia, caused by the dog bite received on January 26, 1918, as hereinbefore alleged."

She also made the necessary allegations respecting the age, condition of health, etc., of the deceased and the dependency of herself and her three minor children, ranging in age from twelve to three years, etc., and prayed for judgment according to the provisions of the act.

The defendants demurred to the complaint upon several grounds. The only ground that is material here, however, is that the complaint does not state facts sufficient to constitute a cause of action. The district court sustained the demurrer upon that ground, and judgment dismissing the action was duly entered, from which the plaintiff appeals.

Plaintiff's counsel insist that the court erred in sustaining the demurrer. Our statute (Comp. Laws Utah 1917, section 3122) allows compensation to every employé 1 coming within the provisions of the act who is "injured by accident arising out of and in the course of his employment." In view of the facts alleged in the complaint, all of which are admitted by the demurrer, the district court held that, while the deceased was injured by an accident occurring in the course of, yet he was not injured by an accident arising out of, his employment. Whether a particular injury is occasioned by an accident arising out of the employment may present a more or less perplexing question, and with respect to which reasonable men may well differ. Indeed, that is the difficult question in this case; and we fully appreciate the fact that the decisions of the courts are not unanimous upon that question. As is well said by Mr. Van Doren in referring to the Workmen's Compensation Act in his Workmen's Compensation, page 43:

"The extremely liberal construction of the courts (of the act)



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has, as we have seen, made possible a recovery of compensation by the injured employé in a large proportion of the cases."

We are also reminded that our statute (Comp. Laws Utah 1917, section 5839) requires that the statutes of this state are to be "liberally construed with a view to effect the objects of the statutes and to promote justice."

Upon the question that the Employers' Liability Act should be liberally construed and so as to effectuate its purposes, all courts agree. *In re Ayers* (Ind. App.) 118 N. E. 386. That doctrine applies especially to the phrase "out of and in the course of the employment."

Notwithstanding the fact that the act must be given a liberal construction, the writer, nevertheless, entertains serious doubt whether, in view of the conceded facts in this case, the injury arose "out of the employment." In view, however, that my Associates are of the opinion that a liberal construction requires us to hold that the injury in this case arose out of, as well as in the course of, the employment, I cheerfully yield to their judgment. I do so with less reluctance or hesitation for the reason that such a holding is manifestly in furtherance of justice, and tends to effectuate the beneficent purposes of the Compensation Act. In this connection it must be remembered that the compensation provided for in the act is in no sense to be considered as damages for the injured employé or to his dependents in case death supervenes. The right to compensation arises out of the relation existing between employer and employé, and that the injury arises out of and in the course of the employment. Under such an act the costs and expenses of conducting the business or enterprise, including compensation for injuries to employés or other casualties, must be taxed to the business. The theory of the Compensation Act is that the whole cost and expense of conducting the business as aforesaid is added to the cost of the articles that are produced and sold, and hence, in the long run, such costs and expenses are borne by the public; that is, by the consumers of the articles produced. The purpose of such an act, therefore, is to protect the employé and those dependent upon him, and in case of his serious injury or

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death to provide adequate means for the support of those dependent upon him. In view, therefore, that in case of total disability or death of the employé his dependents might become the objects of public charity; such a calamity is avoided by requiring the business or enterprise to provide for such dependents, with the right of the employer to add the amount that is paid out to the cost of producing and selling the product of such business or enterprise. The beneficent purposes of such acts are therefore apparent to all, and for that reason, if for no other, should receive a very liberal construction in favor of the injured employé. We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employé or of his dependents as the case may be. 3

Counsel for the defendants Miller and the life insurance company have cited cases, however, wherein it is held that, where an employé has been injured from a cause or accident to which the public generally are exposed the same as the injured employé, the injury does not arise out of the employment. To that effect are the following among other cases cited by counsel: *In re Employers' Liability Assur. Corporation*, 215 Mass. 497, 102 N. E. 697; *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116, 96 Atl. 368, L. R. A. 1916D, 86; *De Voe v. New York State Rys.*, 218 N. Y. 318, 113 N. E. 256, L. R. A. 1917A 250; *Newman v. Newman*, 169 App. Div. 745, 155 N. Y. Supp. 665.

In the case first cited, in referring to the test as to when it may be said that an accident or injury arises out of the employment, the court, in the course of the opinion, said:

"It (the injury) arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all of the circumstances a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, *if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment*, then it arises 'out of' the employment." (Italics mine.)

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This, it seems to the writer, is too rigid a construction of the statute. Such a construction brings us right back to the old proposition that the employer would be liable upon the ground of negligence in a common-law action. If the injury or accident should "have been contemplated by a reasonable person," as is stated in the excerpt quoted from the opinion, then the employer should have foreseen it and protected the employé. If the employer contemplates or foresees an injury and does nothing to prevent it, he is necessarily guilty of negligence, and is thus liable to the injured employé unless the latter is guilty of contributory negligence which is the proximate cause of the injury. Such a construction, I think, is not sustained by the weight of authority.

Nor is the doctrine, that if the public, or a portion of it, is exposed to the same hazard as the employé, then he, for that reason, may not recover, followed by the more recent decisions. In the case of *Globe Indemnity Co. v. Industrial Accident Commission*, 36 Cal. App. 280, 171 Pac. 1088, cited by counsel for plaintiff, the court, in discussing that question in the course of the opinion, said:

"The petitioner contends that, because Roberts was exposed only to the ordinary perils of the street to which any other person on the street is exposed, he does not fall within the rule which awards compensation for an injury arising out of the employment of the injured man. When the logical result of the application of the rule for which petitioner is contending is considered, the justice of treating this case as one arising out of Roberts' employment is apparent. Consider the case of a messenger boy. He is in no greater peril on the street than any other person there. He carries perhaps his message in his pocket, leaving his arms disengaged and perfectly free to move about. But he is on the street constantly in the course of his employment. To hold that Roberts is not entitled to compensation would be to hold that this messenger boy would likewise not be entitled to compensation for an injury caused to him by the perils of the street. The illustration might be extended further to truck drivers, teamsters, and numerous other classes of employment whose followers use the streets in the regular course of their duty, and whose peril on the streets is no greater than that of any other person, but who would not be injured but for the fact that their duty takes and keeps them on the street. It does not seem to us that the Legislature

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ever intended that these persons should be excluded from the benefit of industrial accident compensation."

To the same effect are *Industrial Com. v. Aetna Life Ins. Co.* (Colo.) 174 Pac. 589; *City of Milwaukee v. Althoff*, 156 Wis. 68, 145 N. W. 238, L. R. A. 1916A, 327; *Baum v. Industrial Com.*, 288 Ill. 516, 123 N. E. 626.

Counsel for both sides have cited many other cases in support of their respective contentions, but the foregoing are sufficient to illustrate the principle upon which the courts proceed.

In view of the foregoing, it follows that the district court erred in holding that under the facts stated in plaintiff's complaint, which are conceded by the demurrer, she was not entitled to recover compensation under the Compensation Act. The judgment is therefore reversed, and the cause is remanded to the district court of Weber county, with directions to overrule the demurrer and to proceed to determine the cause in accordance with the views herein expressed. Plaintiff to recover costs on appeal.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

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### BOOTH v. MIDVALE CITY et al.

No. 2280. Decided November 8, 1919. (184 Pac. 799.)

1. **STATUTES—EXPRESS MENTION AND IMPLIED EXCLUSION.** The maxim, "*Expressio unius est exclusio alterius*," is merely a technical rule of construction and cannot be used to thwart or subvert the obvious intention of the Legislature, and is properly applied only when the legislative intent is not plainly expressed. (Page 226.)
2. **MUNICIPAL CORPORATIONS—PAYMENT FOR STREET PAVING.** A municipality under Comp. Laws 1917, section 570x8, has authority to order a street paved under an arrangement that the municipality should bear one-third of the expense, the county the remainder, and to pay its share of the expense out of the two-mill tax, levy of which is authorized by section 671, subd.

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3; the provisions in sections 674 and 675 for special assessments for local improvements as streets not being exclusive.<sup>1</sup> (Page 227.)

Application to Supreme Court by J. Wilmer Booth for a writ of prohibition against Midvale City and another.

WRIT DENIED.

*J. C. Wood*, of Salt Lake City, for plaintiff.

*H. A. Smith*, of Salt Lake City, for defendants.

THURMAN, J.

This is a proceeding for a writ of prohibition restraining and prohibiting Midvale City, a municipal corporation of Salt Lake county, Utah, from entering into a contract with said county for paving a certain street within the limits of said city. It is stipulated by the parties that the facts alleged in the answer of the defendants are true and constitute all the facts pertaining to the matter in controversy. The answer, in substance, alleges that defendant city is a municipal corporation of the third class; that the other defendant, John Aylett, is its duly elected and qualified mayor; that plaintiff is a resident and taxpayer of said city, both as to real and personal property; that Center street is a public thoroughfare running east and west through said city, and from the Oregon Short Line Railroad on the east to Jordan river on the west the street is wholly within said city, and between said points is a distance of 7,920 feet; that defendant, if not restrained, will enter into a contract with said county whereby said city and county will jointly construct a bituminous pavement eighteen feet wide along and upon said Center street between said points and throughout the entire distance above named, at a total expense of \$42,554.55; that the city's portion of

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<sup>1</sup> *Pettit v. Duke*, 10 Utah, 311, 37 Pac. 568; *Board of Education v. Hunter*, 48 Utah, 373, 159 Pac. 1021.

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said amount will be one-third thereof, or \$14,151.52, which said last-named sum the city intends to pay unless restrained by order of this court; that defendant has not given notice to levy a special tax to raise funds for the payment of said improvement and has taken no steps to that end, but, on the contrary, the defendant, unless restrained, intends to pay its proportion, or one-third of the cost of said improvement, from the general fund of said city; that the city, by its council, has passed a resolution authorizing its mayor to enter into a contract with Salt Lake county whereby the city will agree to pay one-third of the cost of said improvement if the county will pay the remaining two-thirds; that such payment by said city will increase the taxes to be levied against the real and personal property of the plaintiff in the same proportion and in the same manner as it will increase the taxes of other residents of said city and not otherwise; that said Center street is the principal street for traffic and travel through said city, and for more than thirty years last past has been used as a public highway; that it is extensively traveled and forms the chief thoroughfare from Salt Lake City through Midvale City to Bingham Canyon and numerous towns in said county; that said street at all places within the limits of said city is in bad repair and wholly unfit for traffic or travel, and it is necessary to expend approximately \$4,950 on said street in order to place it in condition for temporary use; that when such money is expended for said purpose such repair will be temporary only, and it will be necessary from year to year to expend large sums in maintaining said street within the said city in such condition that it may be used as a public street; that for many years last past said city has been compelled to expend large sums per annum in sprinkling said street within the limits of said city, and said sums have been and in the future will be necessary for said purpose; that if said street shall be paved in the manner contemplated, sprinkling thereof will not be necessary, the improvement thereof will be permanent, and for a long period of time it will not be necessary to expend money in repairing said street; that it is for the best interest of all the people of said city to permit the defendant city to enter into said contract with Salt Lake county.

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Prayer for Prohibition. Writ Denied.

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The facts further show that the bridge on Center street across the Jordan river is in such condition that it is dangerous and inadequate for traffic and travel to and through said city, and that it is necessary to replace the same by a steel structure; that defendant will be compelled to and will replace the same with a steel structure at a cost amounting approximately to \$10,766.32; that the total cost of paving said Center street and replacing said bridge by one made of steel will be approximately \$52,344.12; that said street extends through farming and vacant lands on both sides for practically the entire distance, and it is impracticable to pave the same in whole or in part from funds raised by local assessment upon abutting property; that the expense thereof would be wholly disproportionate to and in excess of any special benefits which said property owners would receive from said improvement; that all the inhabitants of said city will derive substantially the same benefits from the improvement now contemplated in the proposed agreement with said county; that by said proposed agreement with said county the county will pay two-thirds of all the costs of said improvement, including the installation of said steel bridge, and the defendant city will pay the remainder, to wit, the sum of \$17,448.04; that State street from Salt Lake City to the intersection of said Center street is now paved with concrete and bituminous pavement and Salt Lake county proposes to and will pave the public highway from the Jordan river westerly to the town of Bingham, and, unless defendant is permitted to and does join said county in the paving of said Center street, said street will remain unimproved for an indefinite length of time and will remain in such condition that it will not be suitable or fit for public traffic or travel; that if defendant is permitted to join said county in said improvement the entire distance from Salt Lake City to Bingham Canyon will be placed in good condition for public travel. Such, in substance, are the admitted facts.

At the close of the oral argument the court was convinced, without further investigation, that the writ prayed for should be denied, and so ordered immediately, in order that the de-

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fendant might proceed in its contemplated agreement with the county. It only remains to state the contention of the parties and our reasons for the conclusion arrived at.

Plaintiff contends that notwithstanding the provisions of Comp. Laws Utah 1917, section 570x8, which confers upon cities, among other things, the power to pave streets within their limits, and the provisions of section 671, subd. 3, which authorizes cities to levy a tax annually of not to exceed two mills on the dollar to open, improve, and repair streets, still the cities are without power to pay for the pavement of said streets otherwise than by local assessment upon property abutting upon the streets to be improved. In this contention plaintiff relies upon the provisions of said Comp. Laws, sections 673, 674, and 675, all of which sections relate to special taxes levied upon the property of abutting owners in paving districts laid out with the view to improvements by the method of local assessment. Sections 674 and 675, specially relied on by plaintiff, read as follows:

"674. To defray or cause to be defrayed the cost and expense of such improvements or any of them, the city council shall have power and authority to levy and collect special taxes and assessments upon the blocks, lots, or parts thereof, and pieces of ground adjacent to or abutting upon the street, avenue, alley, or sidewalk thus in whole or in part opened, widened, curbed and guttered, graded, parked, extended, constructed, or otherwise improved or repaired, or which may be especially benefited by any of said improvements; provided, that the above provisions shall not apply to ordinary repairs of streets or alleys, and that one-half of the expense of bringing streets, avenues, alleys or parts thereof to the established grade shall be paid out of the general fund of the city; and such council shall have power to pave, repave, or macadamize any street or alley or part thereof in the city, and for that purpose to create suitable paving districts, which shall be consecutively numbered, such work to be done under contract.

"675. The cost of paving, macadamizing, or repaving of the streets and alleys within any paving district, except the intersection of streets and space opposite alleys within such district, shall be assessed upon the lots and lands abutting upon the streets and alleys in such district, in proportion to the square feet, or feet front, or both, so abutting upon such streets and alleys."

The matter in controversy turns entirely upon the question as to whether the method provided by the sections just quoted



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for paying the cost of paving streets is exclusive, or whether the city is also clothed with authority to pay for similar improvements from the general fund. If plaintiff's contention is correct, it follows that in no case can the city use the general funds or any part thereof for the pavement of its streets. No matter where the street may be situated, nor how generally it may be used for traffic and travel, if paved at all it must be paved exclusively at the expense of the abutting owners, and if a sufficient number of the abutting owners protest against it as the law provides they may, then the improvement cannot be made at all. The proposition is novel in this jurisdiction. It is contrary to every conception of the law we have hitherto entertained concerning controversies of this kind.

It is conceded by the plaintiff that, were it not for the provisions contained in the sections quoted, the other sections to which we have referred confer ample authority upon the city to pay for the improvement out of the general fund. In other words, it is admitted that section 570x8, *supra*, which confers power to pave, and section 671, *supra*, which authorizes the levy of a tax annually to open, improve, and repair, would be sufficient to authorize payment out of the general fund for the improvement in question, were it not for the provisions contained in the sections quoted.

Plaintiff's contention in the concrete is best explained by quoting literally from his able brief in this case. After quoting the language of section 674, *supra*, he says:

"While the words 'shall have power and authority to levy and collect special taxes and assessments,' as used in section 674, would seem to be merely the grant of an additional power, yet the subsequent provisions of the statute that special assessments shall not apply to ordinary repairs, or one-half of the expense of bringing streets to grade, indicates that it was the intention of the Legislature to limit the authority of the city councils in the making of local improvements, and paying for the same, doing so by special taxes and assessments upon the property especially benefited thereby. The express mention that special assessments shall not be levied to make ordinary repairs, or for paying one-half of the expense for bringing streets to grade and the provision that ordinary repairs, or one-half of such expense to bring streets

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to grade, shall be paid out of the general fund, implies that all other improvements of a local nature, especially benefitting certain property, shall be paid for by assessments upon the property especially benefited."

It will be seen from the foregoing excerpt that plaintiff relies upon the maxim, "*Expressio unius est exclusio alterius*." His argument proceeds:

"\* \* \* The express mention that ordinary repairs and one-half the expense of bringing streets to grade, shall be paid out of the general fund, is an exclusion of all other improvements mentioned in that particular section of the statute, and a limitation upon the authority of the city council, where the improvement is a local one, to the defraying of the expense by special taxes or assessments."

The maxim relied on is merely a technical rule of construction. It cannot be used to thwart or subvert the obvious intention of the Legislature. It should only be resorted to when the intention of the Legislature is not otherwise plainly expressed. No reason is stated by plaintiff, nor does any appear to the mind of the court, why all of the provisions of the various sections referred to may not stand and be given full force and effect. Section 570x8. *supra*, confers upon the city the express power to pave. Section 671, *supra*, confers power upon the city to raise a fund annually by general taxation at least to the extent of two mills on the dollar. No reason is given why this fund may not be applied in paving the streets of the city in the discretion of the city council, except in the opinion of plaintiff to the effect that these provisions of the law should yield to the maxim, "*expressio unius*," etc. which, as before stated, is a mere rule of construction to be resorted to only when the intention is not otherwise clearly expressed. All the reasons which occur to our minds are against plaintiff's contention. Not only is the language of the statute conferring power to make the improvement and the means to do it with by general taxation clear and unmistakable, but the reasons why cities should have such power are equally clear. It is admitted in the instant case that all of the inhabitants of Midvale City will derive substantially the same benefits from the contemplated improvement. Center street is the principal street of

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Prayer for Prohibition. Writ Denied.

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the city. It is used by all of the inhabitants and the public generally. Why should not this general fund which the city is authorized to raise for the very purpose of improving the streets be applied to paving this particular street which is admittedly for the common benefit of all? Why should the city be compelled to resort to proceeding by local assessment upon the property of abutting owners and incur the risk of a successful protest which would defeat the undertaking altogether? It is easy to conceive of an improvement upon a street that ought not to be made against the protest of abutting owners—a street which may be of small consequence to the general public but of infinite importance to those living in the immediate vicinity. In such case, the city in its discretion should, and probably would, resort to the method of local assessment instead of applying the general fund.

Counsel for plaintiff has industriously collated and called to our attention several cases bearing in a greater or less degree upon the matter in controversy. As sustaining his contention, however, they are far from satisfactory. They are nearly all easily distinguished from the case at bar. The distinction will readily appear upon casual examination, and therefore the cases need not be considered in detail. Such as are not distinguishable, we believe, are contrary not only to reason but to the great weight of authority. We cite them, however, for the benefit of those whom it may concern: *Pettit v. Duke*, 10 Utah, 311, at page 317, 37 Pac. 568; *Township of Dubuque v. City of Dubuque*, 7 Iowa, 262; *Bryan v. Sundberg*, 5 Tex. 418; *Scott v. Ford*, 52 Or. 288, 97 Pac. 99; *N. Y. Central R., etc., Co. v. Reusens*, 151 App. Div. 458, 135 N. Y. Supp. 919; *Murtauge v. Patterson*, 45 N. J. Law, 267; *Findlay v. Howe*, 13 Wash. 236, 43 Pac. 28; *Bank of Lansing v. Lansing*, 25 Mich. 207; *Zottman v. San Francisco*, 20 Cal. 97, 81 Am. Dec. 96; *Johnson v. Common Council*, 16 Ind. 227.

The defendant city contends that the power to levy local assessments upon the abutting owners for the improvement of streets is merely an additional power and by 2  
no means exclusive; that the city may resort to the local assessment method or improve the streets out of the general

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Booth v. Midvale City et al., 55 Utah 220.

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fund in its discretion, at least it may apply the general fund to the extent of two mills on the dollar. As already foreshadowed, in our opinion the defendant's contention is correct. In support thereof it calls our attention to the doctrine enunciated by several text-writers and in numerous apparently well-considered cases. In *McQuillan, Mun. Corp.* vol. 4, section 1863, the author says:

"Usually when a municipal corporation has power to make or provide for the making of improvements it has power to make arrangements to meet the expense thereof. The mode of paying for public improvements is sometimes prescribed by statute or charter, but in the absence of express direction the method to be adopted is within the discretion of the proper authorities. A general power authorizing the paying for public improvements by special assessments is usually construed as *not affecting the power of the municipal corporation to make improvements and pay therefor out of the general revenue*. However, the rule is different under authority to make the improvement only at the expense of the property abutting thereon." (Italics ours.)

In 28 Cyc. at page 969, we find the following:

"A municipality, subject to the ordinary legislative limitations as to expenditures and indebtedness, may improve its streets and pay for the same out of its general funds; and a charter or statutory provision allowing special assessments does not necessarily deprive the city of this power; but in the absence of express direction, it leaves to the discretion of the municipal authorities the choice of modes for defraying the expenses."

Defendant also cites the following cases, many of which are decisive of the question here presented: *Commonwealth v. George*, 148 Pa. 463, 24 Atl. 59, 61; *Garden City v. Trigg*, 57 Kan. 632, 47 Pac. 524; *Atchison v. Len*, 43 Kan. 138, 29 Pac. 467; *Tappan v. Long Branch, etc.*, 59 N. J. Law, 371, 35 Atl. 1070; *City of Evansville v. Summers*, 108 Ind. 189, 9 N. E. 81; *Memphis v. Brown*, 20 Wall. 289, 22 L. Ed. 264; *Soule v. City of Seattle*, 6 Wash. 315, 33 Pac. 384; *Pine Tree Lumber Co. v. City of Fargo*, 112 N. D. 360, 96 N. W. 357; *Clark v. City of Des Moines*, 19 Iowa, 221, 87 Am. Dec. 423; *State ex rel. v. City of Ely*, 129 Minn. 40, 151 N. W. 545, Ann. Cas. 1916B, 189; *Barber Asphalt Pav. Co. v. City of Harrisburg*, 64 Fed. 283, 12 C. C. A. 100, 29 L. R. A. 401; *District of Columbia v. Lyon*, 161 U. S. 200, 16 Sup. Ct. 450, 40 L.

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Ed. 670; *Portland Lumber Co. v. City of East Portland*, 18 Or. 21, 22 Pac. 543, 6 L. R. A. 290; *United States v. Ft. Scott*, 99 U. S. 152, 52 L. Ed. 348; *Heller v. Garden City*, 58 Kan. 236, 48 Pac. 841; *Board of Education v. Hunter*, 48 Utah, 373, 159 Pac. 1021; *State v. Eldredge*, 27 Utah, 477, 76 Pac. 339.

The cases speak for themselves, and this opinion would not be strengthened by our attempting an elaborate review.

From the showing made by the admitted facts, plaintiff, as a taxpayer of the city would have little or nothing to gain even if we were permitted to consider the case from the standpoint of what would be least burdensome to him. It is admitted that, if the agreement with the county is forbidden or restrained and the improvement is not made as contemplated, the city will be compelled, at its own expense, to construct the bridge across the Jordan river at a cost of nearly \$11,000, and make immediate temporary repairs to the street at a cost of nearly \$5,000, besides the annual cost of sprinkling, to the extent of several hundred dollars. These sums the city has the undoubted right to expend, and it is admitted that it will expend them unless the agreement with the county for the permanent improvement is permitted. It is a simple matter of addition to demonstrate that these sums aggregate approximately the same amount as the city will have to pay for the permanent improvement sought by this action to be restrained. These considerations have no logical bearing upon the question presented here, but they at least serve to emphasize the fact that there is no question of hardship to the plaintiff involved.

For the reasons stated, it is ordered that the temporary writ be quashed and a permanent writ denied. Defendant to recover costs.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

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State v. Overson, 55 Utah 230.

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## STATE v. OVERSON.

No. 3375. Decided November 10, 1919. (185 Pac. 364.)

1. CRIMINAL LAW—PRELIMINARY EXAMINATION MAY BE WAIVED BY ACCUSED ALONE. A preliminary examination is a substantial right of one accused of a felony, and when he waives that right it must be of his own choice, not because an arresting officer insists upon the waiver. (Page 232.)
2. CRIMINAL LAW—RECORD NOT SHOWING EVIDENCE, OVERRULING OF MOTION TO QUASH SUSTAINED. Where bill of exceptions shows that hearing was had on motion to quash information, and that the court heard evidence which the records fails to show, the presumption is that evidence was sufficient to justify trial court in overruling motion. (Page 232.)
3. INDICTMENT AND INFORMATION—EFFECT OF WITHDRAWING REASONS FOR NOT FILING INFORMATION. Though, after transcript was transmitted to district court, district attorney filed a "statement of reasons in law for not filing information," where statement was withdrawn by permission of court, which immediately ordered district attorney to file an information, court properly refused to quash information on ground that district attorney "lost all further jurisdiction or right to proceed in the case unless ordered to do so by the court," under Comp. Laws 1917, section 8780. (Page 233.)
4. CRIMINAL LAW—HEARSAY EVIDENCE OF ADMISSION OF THIRD PERSON INADMISSIBLE. In prosecution for burglary, testimony of wife that her husband, who had been arrested on the same charge, tried, and discharged, stated that he got some of the property stolen at a named place when he was alone, was hearsay and inadmissible. (Page 234.)
5. CRIMINAL LAW—EXCLUDING TESTIMONY FOR WRONG REASON NOT ERROR. If the ruling of the court in excluding testimony was right for any reason, the court committed no error.<sup>1</sup> (Page 234.)
6. CRIMINAL LAW—DEFINITION OF REASONABLE DOUBT. In prosecution for burglary, instruction defining reasonable doubt as "a doubt for which you can give a reason," while not commended, held not prejudicial error. (Page 234.)
7. CRIMINAL LAW—GENERAL EXCEPTION TO INSTRUCTION INSUFFICIENT. A general exception to an instruction containing differ-

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<sup>1</sup> *Holt v. Nielson et al.*, 37 Utah, 574, 109 Pac. 473.

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ent propositions, six of which are correct statements of law, is not available on appeal.<sup>2</sup> (Page 234.)

8. **CRIMINAL LAW—GIVING INSTRUCTION NOT SUPPORTED BY EVIDENCE REVERSIBLE ERROR.** Instruction, that, if possession of recently stolen property is accompanied with such evidence as the defendant's giving false, incredible, or contradictory accounts of the manner of acquiring it, his attempting to conceal it, or his being so near to the place where the property was stolen or the building entered as to create criminating circumstances against him, such and other like circumstances may create a presumption of guilt in possessor, requires reversal; there being no evidence to support the instruction. (Page 235.)
9. **CRIMINAL LAW—INSTRUCTIONS, ASSUMING FACTS.** Instructions which assume that there is evidence before the jury tending to prove material facts, when there is no such evidence, are improper. (Page 235.)
10. **CRIMINAL LAW—MISLEADING INSTRUCTION AS TO EVIDENCE.** When evidence is referred to in an instruction, it should not be stated in a manner to mislead jurors or to cause confusion in their minds. (Page 235.)
11. **CRIMINAL LAW—INSTRUCTION OMITTING ESSENTIAL ELEMENT.** Instruction as to possession of recently stolen property by defendant, prosecuted for burglary, held misleading, in that it omitted essential element that accused's presence at the place where the property was stolen or the burglary committed must have been at or near the time when the crime was committed. (Page 235.)
12. **CRIMINAL LAW—INSTRUCTIONS AS TO POSSESSION OF STOLEN GOODS.** In instruction relative to possession of recently stolen property, the circumstances should have been submitted to jury without statement that they "may raise a presumption of guilt in the possessor." (Page 235.)

Appeal from District Court of Millard County, Fifth District; *D. H. Morris*, Judge.

Junior Overson was convicted of burglary, and appeals.

REVERSED, and new trial granted.

<sup>2</sup> *State v. Riley*, 41 Utah, 225, 126 Pac. 294; *State v. Haworth*, 24 Utah, 398, 68 Pac. 155; *State v. King*, 24 Utah, 482, 68 Pac. 418, 91 Am. St. Rep. 808; *State v. Campbell*, 25 Utah, 342, 71 Pac. 529.

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State v. Overson, 55 Utah 230.

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*J. H. McKnight*, of Nephi, and *R. B. Thurman* and *H. C. Allen*, both of Salt Lake City, for appellant.

*Dan B. Shields*, Atty. Gen., and *J. H. Wolfe*, *O. C. Dalby*, and *H. Van Dam, Jr.*, Asst. Attys. Gen., for the State.

WEBER, J.

Defendant was tried in the district court on the charge of burglary in the third degree, was found guilty by a jury, and appeals from the judgment of conviction.

It is claimed by defendant that the court erred in refusing to quash the information, because he was not given an opportunity to have a preliminary examination. The 1, 2 defendant filed his affidavit, and in it claimed that he never intended to waive a preliminary examination; that his request to be permitted to see an attorney was denied by the sheriff; and that the sheriff, without his consent, told the justice of the peace that the preliminary examination was waived, and the justice so ordered. A preliminary examination is a substantial right of one accused of a felony, and when he waives that right it must be of his own choice, not because an arresting officer insists upon the waiver. Had defendant's affidavit remained uncontradicted, it would have been error to overrule the motion to quash the information; but the bill of exceptions shows that a hearing was had upon the motion and that the court heard evidence. What that evidence was the record does not show. The presumption is that it was sufficient to justify the court in overruling the defendant's motion.

The transcript transmitted by the justice of the peace was filed in the district court August 20, 1917, and on September 4, 1917, the district attorney filed a "statement of reasons in law for not filing information." It is argued by appellant's counsel that the district attorney "lost all further jurisdiction or right to proceed in the case unless ordered to do so by the court," and they cite section 8780, Comp. Laws 1917 (section 4693, Comp. Laws 1907), which provides:



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"If the district attorney determines that an information ought not to be filed in any such case, he must make, subscribe, and file with the clerk of the district court of the county a statement in writing setting forth his reasons in fact and in law for not filing such information, and such statement must be filed during the term of court at which the defendant is held to appear for trial. The court must thereupon examine such statement, together with the evidence filed in the case, and if, upon such examination, the court is not satisfied with such statement, the district attorney must be directed and required by the court to file the proper information and bring the case to trial. But if the court does not require that information to be filed, and the defendant is not held or wanted to answer for any other public offense, he shall be discharged, his bail exonerated, and his money refunded to him."

The record discloses that the district attorney's "statement" was withdrawn by permission of the court October 2, 1917, and that immediately thereafter, on the 3 same day, the district attorney was ordered by the court to file an information in the case. The information was then filed. No necessity existed for withdrawing the statement filed by the district attorney, nor could such withdrawal in any possible manner result in prejudice to the defendant. When the court ordered the information to be filed, and the order was obeyed by the district attorney, it was a full compliance with the requirements of the statute. We find neither error nor irregularity in the court's refusal to sustain the motion to quash the information.

The defendant called Mrs. Frank Slaughter as a witness, and after she had testified that her husband brought home some of the property alleged to have been stolen by defendant, she was interrogated as to statements then made by her husband, who had been arrested on the same charge on which defendant was being tried, and had been discharged. The defense sought to prove by the witness that she had been told by her husband "where he got the stuff; that he stated to her that he was alone when he got it, and where he got it." The question was objected to by the state as calling for hearsay testimony. The objection was overruled, whereupon the district attorney made the further objection that the proposed testimony should be excluded because "a wife should not be

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allowed to testify against her husband." The court thereupon sustained the objection on the ground that what was said by her husband to the witness was a privileged communication. If defendant could prove by competent evidence that some other person committed the crime with which defendant was charged it would be a good defense; but testimony that some third party admitted to the witness, or declared in her presence, that he, and not the defendant, committed the crime, would be hearsay, and would be incompetent and inadmissible. Wharton, *Crim. Ev.* (10th Ed.) section 225. The proposed testimony was properly excluded—not on the ground that it was a privileged communication, but because it was hearsay. "If the ruling was right for any reason, the court committed no error." *Holt v. Nielson et al.*, 37 Utah, 574, 109 Pac. 473. 4, 5

Objection is made that the trial court, in its instruction defining reasonable doubt, used the words "a doubt for which you can give a reason." The statement has been approved by some courts, criticized by others, and by many has been held to be prejudicial error when used in a charge to a jury. 2 Brickwood, Sackett's Instructions, sections 2652-2673; 3 Brickwood, sections 4430-4435. See, also, *Abbott v. Territory*, 20 Okl. 119, 94 Pac. 179, 16 L. R. A. (N. S.) 260 and notes, 129 Am. St. Rep. 818. 6

In the present case exception was not taken to the particular words above quoted. The exception was general, and to an instruction that contained different propositions, including six which were correct statements of law. That an exception must specifically point out to the court the matter objected to, in order to be of avail on appeal, has been repeatedly held by this court. *State v. Riley*, 41 Utah, 225, 126 Pac. 294; *State v. Haworth*, 24 Utah, 398, 68 Pac. 155; *State v. King*, 24 Utah, 482, 68 Pac. 418, 91 Am. St. Rep. 808; *State v. Campbell*, 25 Utah, 342, 71 Pac. 529. Had the exception been properly taken, we still would not hold that the words complained of in defendant's brief would be prejudicial error in this particular instance, though we do not commend the words "for which you can give a reason" 7

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as being enlightening to the jury or in any way desirable or useful in an instruction defining reasonable doubt.

In an instruction in which the court declared possession of recently, stolen property not of itself sufficient for conviction of defendant, the court informed the jury:

"But if such possession is accompanied with such evidence as the defendant giving false, incredible, or contradictory accounts of the manner of acquiring it, his attempting to conceal it, or his being so near to the place where the property was stolen or the building entered as to create criminating circumstances against him, such and other like circumstances, when shown in connection with the possession, the larceny or house breaking, may raise a presumption of guilt in the possessor."

Instructions should be applicable to the evidence, and instructions which assume that there is evidence before the jury tending to prove material facts, when there is 8-10 no such evidence, are improper, and have generally been held to be prejudicially erroneous. When evidence is referred to in an instruction, it should not be stated in a manner to mislead jurors or to cause confusion in their minds. In the above instruction the reference to "false, incredible, or contradictory statements of the manner of acquiring it" could not have been helpful to the jury, and may have been misleading and confusing because there was no evidence whatever of "contradictory" statements by defendant. The only statements by defendant referring to the manner in which he had acquired the property alleged to have been stolen were that he had bought the articles at a bargain from a person who was leaving or moving, and when the prosecuting witness identified certain articles as being his property he was called a liar by the defendant. Nor was there any reason or justification for referring to defendant's attempting to conceal the stolen property. We have examined the transcript with care, and find no testimony tending to prove concealment by defendant of the stolen property found in his possession.

The record is also devoid of any testimony tending to prove that defendant was "so near to the place where the property was stolen or the building entered as to create 11, 12

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a criminating circumstance against him." The sentence last quoted is not only without basis in the evidence; it is misleading, in that it omits the essential element that, in order to be a circumstance for consideration by the jury, his being at the place where the property was stolen or burglary was committed must have been at or near the time when the crime was committed, not at some time so remote that it could not possibly have any bearing upon his guilt or innocence. Assuming that the statements in the instruction were based on evidence, the circumstances should have been submitted to the jury without the statement that they "may raise a presumption of guilt in the possessor." *Barrow v. Territory*, 13 Ariz. 302, 114 Pac. 976; *Smith v. State*, 58 Ind. 340; 2 Am. C. R. 375; *State v. Hodge*, 50 N. H. 510.

Were the evidence of guilt in this case so clear that no other verdict than that of guilty could have been found in reason, we might possibly consider the instruction referred to as being erroneous, without being prejudicial to the defendant; but a careful consideration of all the evidence disclosed by the record convinces us that the instruction given was prejudicial to defendant, and that it probably prevented the jury from giving the evidence that fair and impartial consideration to which the accused was entitled. <sup>1</sup>

The judgment is reversed and defendant granted a new trial.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

## Appeal from Third District.

## BUSH v. BUSH et ux.

No. 3357. Decided November 12, 1919. (184 Pac. 823.)

1. REPLEVIN—ELEMENTS OF ACTION IN CLAIM AND DELIVERY. The essential elements of an action in claim and delivery are the same as in the common-law action of replevin. (Page 238.)
2. REPLEVIN—PLEADING OF RIGHT OF POSSESSION. Complaint in action of claim and delivery should state facts from which it may be inferred with reasonable certainty that plaintiff is entitled to possession of property at time of commencement of action; an allegation of ownership being insufficient, inasmuch as owner may not be entitled to possession.<sup>1</sup> (Page 240.)
3. REPLEVIN—RIGHT OF OWNER TO BRING ACTION. Owner has no right to bring action in claim and delivery, unless he is entitled to immediate possession of the property. (Page 240.)
4. PLEADING—ALLEGATIONS OF COMPLAINT. Complaint, in order to state cause of action, must state facts which, if true, will entitle plaintiff to legal or equitable relief. (Page 240.)
5. REPLEVIN—SUFFICIENCY OF ALLEGATIONS AS TO POSSESSION. Complaint, in action in claim and delivery, held defective in failing to allege plaintiff's right to possession of the property at the time of bringing the action. (Page 243.)
6. PLEADING—COMPLAINT MUST ALLEGE ULTIMATE FACT. In pleading a cause of action, ultimate fact must be stated. (Page 244.)
7. PLEADING—WAIVER OF DEFECT. In action in claim and delivery where complaint was defective in failing to plead plaintiff's right to possession, defendant by tendering requested instructions relating to the right of possession, and by permitting court without objection or exception to give other instructions relating to possession, waived such defect.<sup>2</sup> (Page 244.)
8. PLEADING—ANSWER SUFFICIENT TO RAISE ISSUE OF POSSESSION. In action in claim and delivery where complaint was defective in failing to plead plaintiff's right of possession, answer held not to waive defect. (Page 244.)
9. APPEAL AND ERROR—PRESUMPTION AS TO JUDGMENT. Every reasonable intendment must be indulged in favor of the judgment. (Page 245.)

<sup>1</sup> *Chambers v. Emery*, 36 Utah, 380, 103 Pac. 1081, Ann. Cas. 1912A, 332, and note.

<sup>2</sup> *Harkness v. McClain*, 8 Utah, 52, 29 Pac. 964; *Voorhees v. Manti City*, 13 Utah, 435, 45 Pac. 564; *Mangum v. Bullion, Beck & Champion Min. Co.*, 15 Utah, 534, 50 Pac. 834.

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Bush v. Bush et ux., 55 Utah 237.

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Appeal from District Court of Salt Lake County, Third District; *J. Louis Brown*, Judge.

Action by Clara Bush, administratrix, etc., against Amos Bush and wife. Judgment for plaintiff, and defendants appeal.

**AFFIRMED.**

*Hancock & Barnes*, of Salt Lake City, for appellants.

*Robt. L. Judd*, of Salt Lake City, for respondent.

THURMAN, J.

This is an action in claim and delivery. The essential elements are the same as in the common-law action of replevin. A verdict was rendered in favor of plaintiff, 1 and judgment entered thereon. After judgment the defendants moved the court to dismiss the complaint and vacate the judgment on the ground that the "complaint does not state facts sufficient to constitute a cause of action." The motion was overruled, and the order overruling it is assigned as error, and relied on by appellants for a reversal of the judgment.

The complaint, after alleging the death of plaintiff's intestate, the plaintiff's appointment as administratrix, and a description of the property proceeds as follows:

"That on the 13th day of October, 1918, and for some time prior thereto Hubert Bush, deceased, was the owner and in possession of said property, and that ever since said date his said estate has been and now is the owner of said property, which is of the reasonable value of \$775.

"That on or about the 4th day of November, 1918, the defendants did wrongfully and willfully and without the consent of the plaintiff keep the said goods in their possession, and refuse to deliver them to the said plaintiff herein. ¶

"That on or about the 4th day of November, 1918, and before the commencement of this action, the plaintiff duly demanded the said goods from the said defendants, but that the said defendants

## Appeal from Third District.

wrongfully and willfully refused to deliver to the plaintiff the said goods in question.'

(Prayer for judgment.)

The specific objection made to the complaint by appellants is that it fails to allege that plaintiff was entitled to possession of the property when the action was commenced. It is contended by appellants that in an action of this kind a complaint which fails to allege that plaintiff is entitled to the immediate possession of the property in controversy is fatally defective. On the other hand, respondent contends that an allegation of ownership in the plaintiff carries with it a presumption of right to possession, and therefore a specific allegation of right to possession is not essential. Each of the parties present for our consideration numerous authorities in support of their respective contentions, from which it appears there is more or less conflict, and in some respects no little confusion.

The authorities cited and relied on by appellant are as follows: *Chambers v. Emery*, 36 Utah, 380, 103 Pac. 1081, Ann. Cas. 1912A, 332, and note, 23 R. C. L. 925; *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750; *Simonds v. Wrightman*, 36 Or. 120, 58 Pac. 1100; *Casto v. Murray*, 47 Or. 57, 81 Pac. 388; *Masterson v. Clark*, 41 Pac. 796;<sup>3</sup> *Bane v. Peerman*, 125 Cal. 220, 57 Pac. 885; *Vanalstine v. Whelan*, 135 Cal. 232, 67 Pac. 125; *Chan v. Slater*, 33 Mont. 155, 82 Pac. 657; *Eilers v. Pick*, 58 Or. 54, 113 Pac. 54; *Kimball v. Redfield*, 33 Or. 292, 54 Pac. 216; *Kierbow v. Young*, 20 S. D. 414, 107 N. W. 371, 8 L. R. A. (N. S.) 216, 11 Ann. Cas. 1148; *Vitagraph v. Swaab*, 248 Pa. 478, 94 Atl. 126, Ann. Cas. 1916C, 311; *Cobbey*, Replevin, sections 526-529.

<sup>3</sup>Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 109 Cal. xv.

Respondent, in reply, calls our attention to the following: *Pierce v. Langdon*, 3 Idaho (Hasb.) 141, 28 Pac. 401; *Bates v. Capital State Bank*, 18 Idaho, 429, 110 Pac. 277; *Ill. Sewing Mach. Co. v. Harrison*, 43 Colo. 362, 96 Pac. 177, and cases cited; *McAfee v. Montgomery*, 21 Ind. App. 196, 51 N. E. 957; *Nielsen v. Hyland*, 170 Pac. 778.

From an examination of the authorities cited it will appear

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that the contentions of both parties find considerable support. There is a looseness of expression in many of the cases, in one respect, which has led to some of the confusion above referred to. For example, many of the cases express the view that it is necessary to allege either that the plaintiff is the owner of the property, or that he is entitled to its possession at the time the action is commenced. One or more of the decisions of this court above cited, in the matter referred to, are subject to the same criticism. In every instance, however, where such looseness of expression occurs the specific question here presented was not involved. Such expressions as those referred to, if not carefully read and considered in connection with the facts of the particular case, are well calculated to mislead the reader and induce him to believe that either an allegation of ownership or right to possession at the time the action is commenced is sufficient; that it is not necessary to allege both. We are of the opinion that such is not a correct view of the law, and, save in exceptional cases, it is contrary to the great weight of authority as laid down both by text-writers and in the adjudicated cases. The exceptional cases are where the statement of facts shows that plaintiff is entitled to the immediate possession of the property when the action is commenced, notwithstanding he may not be the owner of the property. The right of immediate possession is an essential element of the action whether the 2-4 plaintiff is the owner of the property or not. But the converse of the proposition is not maintainable; an allegation of ownership merely is not sufficient, for the reason that, while one party may be the owner of the property, another may be entitled to the present possession. Any number of illustrations will occur to the mind of the reader without making specific reference. This being the case, it is fallacious to assert that an allegation of ownership alone is sufficient. Any complaint, in order to state a cause of action, must state facts which, if true, will entitle plaintiff to legal or equitable relief. This is the crucial test. How, then, can it be contended that where a complaint alleges ownership only it states a cause of action when, even admitting that fact to be true, the plaintiff



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may, nevertheless, not be entitled to relief as against one having the right of possession when the action is commenced?

In some of the cases cited, especially those from the state of Colorado, it appears a different doctrine is enunciated. The cases so decided proceed upon the theory that an allegation of ownership in the plaintiff carries with it the presumption that plaintiff is entitled to possession. This would be true if the presumption was absolutely conclusive; but, inasmuch as at most it is only a rebuttable presumption, we feel justified in holding that the doctrine is fallacious, and is founded upon an erroneous conception of the legitimate functions of pleading in a court of justice. Much as we appreciate the high standing of the Supreme Court of our sister state, we cannot subscribe to the doctrine announced in the cases referred to.

In Wells on Replevin (2d Ed.) section 94, it is said:

"One of the cardinal rules of this action is, that the plaintiff must in all cases have a general or special property in the goods which he seeks to recover, with the right to their immediate and exclusive possession at the time of the commencement of his suit. This has been the rule from the earliest times, and is sustained by an unbroken current of authorities to the present day. It is also an established rule that the plaintiff, having such property and right of possession, may sustain the action without other title, even against the general owner."

Again, the same author, in section 670, in stating the essential elements of a complaint, says:

"The declaration should be drawn to meet the proof which will be produced at the hearing. The gist of the action is the wrongful detention. The plaintiff must allege the right or title in himself as it exists, the right to immediate possession, and the detention by the defendant."

Shinn on Replevin, section 428, states the rule more elaborately and perhaps more succinctly:

"The declaration, complaint, or petition (as the first pleading on the part of the plaintiff may be called) must in general contain an averment of the three fundamental facts which together make up a cause of action in replevin. That is to say, the plaintiff must, in ordinary cases in the pleading by which he states to the court his cause of action, state the following facts: (1) The ownership of the plaintiff; (2) the right of the possession of the plaintiff to the property at the time the action is brought; and (3)

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the present wrongful detention of the defendant."

Cobbey on Replevin, section 27, cited by appellant, says:

"Replevin is strictly a possessory action, 'such wherein the right of possession only, and not of property, is contested.' Its primary object is to enable the plaintiff to obtain the actual possession of personal property wrongfully detained from him by the defendant at the time the action is brought. Generally speaking, in an action of replevin the right to the possession of the property at the time the suit is brought is the only matter in controversy, and the only question that can be tried and determined therein."

The same author, in section 591, in naming the essentials of a good complaint, states the rule with less perspicuity as follows:

"A complaint which alleges (1) wrongful taking, (2) wrongful possession, (3) unlawful conversion, is a good complaint in replevin. The complaint must show a right of property and of possession in the plaintiff."

In 23 R. C. L. p. 925, under the head of Pleading, it is said:

"It may be stated as a well-settled general rule that it is necessary to allege both the ownership, either general or special, and the right to immediate possession in a complaint for replevin."

Further on in the same section the author says:

"Where the complaint merely alleges ownership in the plaintiff without averring a right to possession, no cause of action is stated. It is necessary to allege that the plaintiff is the owner and entitled to possession of the property at the date of the commencement of the suit."

In 34 Cyc. at page 1464, we find the following:

"In an action of replevin, as in other civil actions, the complaint must allege facts sufficient to constitute a cause of action, and to show that it exists in favor of plaintiff, and against defendant. Whether the action is at common law or under the statutes, the complaint must state in clear and concise language the facts upon which plaintiff bases his right and which entitle him to recover, and it must allege facts, and not matters of evidence, or legal conclusions. The material facts to be alleged are plaintiff's ownership, either general or special, of the property, describing it, his right to its immediate possession, and the wrongful taking or detention thereof by defendant."

The foregoing excerpts state the law as maintained by all

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the text-writers we have examined upon the question involved, and we have no reason to believe there is any substantial dissent from the doctrine thus announced. Hence we are driven to the conclusion that an allegation of ownership alone is not sufficient; that there must be a statement of facts from which it may be inferred with reasonable certainty that plaintiff is entitled to the possession of the property when he commences his action, and, as stated by Cyc., supra, it must be a statement of facts, and not mere legal conclusions. See, also, *Chambers v. Emery*, 36 Utah, 380, 103 Pac. 1081, Ann. Cas. 1912A, 332.

With this statement of the law as we find it, we come now to an analysis of the complaint in the instant case. If there are sufficient facts stated from which it may be inferred with reasonable certainty that plaintiff at the time the action was commenced was entitled to the immediate possession of the property, then the complaint states a cause of action, and the contention of appellant is without merit.

The complaint in effect alleges that plaintiff's intestate was the owner of the property at the time of his death, and that plaintiff thereafter, as administratrix, became the owner and continued to be so until the action was commenced; that on the 4th day of November thereafter the defendant wrongfully, willfully, and without consent of plaintiff kept possession of the property, and on said date wrongfully and willfully refused to deliver it to plaintiff, although she made demand therefor. This is all that is alleged concerning ownership and right of possession. It will be observed the complaint nowhere alleges that plaintiff was entitled to the possession of the property, either at the time of commencing the action or at the time the complaint was verified, which was on the 13th day of November, 1918. From November 4th until November 13th there is a complete hiatus in the pleading concerning the possession or right of possession, unless we indulge in the presumption that right of possession follows from the fact of ownership, as held by the Colorado court.

We have already observed that that is a deduction that

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should not be made in pleading. It may be proper as a matter of evidence in the trial of a cause, but, in pleading, ultimate facts must be stated. *Fredericke v. Tracy*, 98 Cal. 660, 33 Pac. 750. 6

Respondent seems to rely with considerable assurance on the case of *Nielsen v. Hyland*, 51 Utah 334, 170 Pac. 778. In that case the complaint alleged the ownership and value of the property, the wrongful possession by defendants, the demand of plaintiff, and that defendants still continued to wrongfully detain the property, thus bringing the wrong complained of down to the very commencement of the action. Such a state of facts, in our opinion, justifies the conclusion that the plaintiff was entitled to the possession of the property when he commenced his action. We held the complaint was sufficient; we are still of the same opinion, but, without stating the difference in detail, it is sufficient to say no such case is presented here.

In view of what has been said it follows that in our opinion the complaint in this case is fatally defective; and, unless the appellants, by their course of conduct, waived the defect, the judgment of the trial court should be reversed. 7

The defendants answered the complaint, but it cannot be contended that the answer waived the defect by tendering the issue omitted in the complaint. The answer, in brief, merely denies the allegations of the complaint relating to ownership by plaintiff and wrongful detention by defendants, and affirmatively alleges ownership in defendants. 8

During the course of the trial defendants tendered certain requests to instruct the jury relating to the right of possession. These were refused by the court, but the circumstance tends to show that right of possession was accepted as an issue at the trial, and evidence admitted thereon. Furthermore, the court was permitted, without objection or exception, to instruct the jury as follows:

"You are instructed that if you find by a preponderance of the evidence that the plaintiff in this case, at the time the suit was commenced, was lawfully entitled to the immediate possession of the property in the complaint described, and that the defend-

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ants, or either of them, had the same in their possession, you will find for the plaintiff."

While, as heretofore shown, the right of possession at the commencement of the action was not put in issue by the pleadings, yet it must have been made an issue at the trial, and evidence admitted thereon, or the above instruction would not have been given. Every reasonable intendment must be indulged in favor of the judgment. In 14 Standard Ency. of Procedure, at p. 524, it is said:

"The issues of a case are defined by, and confined to, the pleadings. Ordinarily matters not put in issue by the pleadings cannot be litigated. In determining the issues made in the case, the pleadings, and not the evidence, must be looked to. But the parties by their conduct on the trial may include a disputed fact within the issues of the case, although such fact does not appear at issue in the pleadings."

See, also, note to the above citation.

In vol. 21 of the authority last cited, at pages 411 and 412, the text reads:

"The admission of evidence under a defective allegation, without objection, will generally operate as a waiver of the defects; and the same rule has been applied where the complaint omits some fact essential to a cause of action, but which might be supplied by amendment, although there is authority to the contrary."

The cases cited in this excerpt, in note 25, fully support the text. The first case cited, *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90, a California case, requires something more than a passing notice, because it gives full effect to the provisions of section 475 of the California Code of Civil Procedure, which is substantially the same as our Comp. Laws 1917, section 6622, requiring errors to be disregarded which do not affect the substantial rights of the parties.

The action in the case referred to was for damages resulting from the death of plaintiff's intestate alleged to have been caused by negligence. The complaint failed to show the existence of any heirs, which was conceded to be an essential element in stating a cause of action. The defendants filed a general demurrer, and urged in support of it the omission above referred to. The demurrer was overruled, defendants

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answered and went to trial. Evidence was admitted without objection. On appeal the order of the court overruling the demurrer was relied on for reversal of the judgment. Respondent resisted appellant's contention, and insisted that the admission of evidence without objection cured the omission of the allegation. This point was sustained by the appellate court, which, in the course of its opinion, at page 93 of 147 Pac., at page 325 of 26 Cal. App., used the following language:

"We do not feel disposed to examine the numerous cases cited by the parties. It seems to us that the reformed procedure would receive a decided shock if a defendant should be permitted to stand by and without objection allow an issue to be tried as though properly presented by the pleadings, and on appeal escape the consequences by claiming that the complaint failed to present such issue. If there ever was a case where section 475 of the Code of Civil Procedure was intended to apply, this, seems to us, is one."

Then, after referring to and quoting from *Texas & Pac. Ry. v. Lacey*, 185 Fed. 226, 107 C. C. A. 331, which seems to be in point, the California court proceeds:

"In the case here the trial proceeded in all respects as though the pleadings sufficiently presented the issue as to there being heirs, and precisely as it would had the complaint contained the allegation which it is insisted it should have contained. Why, then, should the case go back to have the complaint amended, as it is manifest that the proofs would be the same? How can it be said that defendant has sustained 'substantial injury, and that a different result would have been probable if such error \* \* \* or defect had not occurred'?"—citing the section above referred to.

The case at bar is substantially similar in every respect to the case from which the above excerpts are quoted, except that in the instant case no demurrer was filed and no objections whatever made until after verdict and judgment had been entered thereon. In that respect this is a stronger case for the application of the rule that harmless errors must be disregarded. The following cases also seem to be in point in a greater or less degree: *Noakes v. City of Los Angeles*, 175 Pac. 409; *Boyle v. Imp. Co.*, 27 Cal. App. 714, 151 Pac. 25; *L. & N. Ry. v. Taylor*, 92 Ky. 55, 17 S. W. 198; *Lounsbury v. Purdy*, 18 N. Y. 515; *Wright v. Deering*, 2 Misc. Rep. 296, 21

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N. Y. Supp. 929; *Hogg v. Pinckney*, 16 S. C. 387; *Sherwood v. City of Sioux Falls*, 10 S. D. 405, 73 N. W. 913; *Martin v. Graff*, 10 S. D. 592, 74 N. W. 1040; *Stenson v. Elfmann*, 26 S. D. 134, 128 N. W. 588; *Rea v. Eslick*, 87 Wash. 125, 151 Pac. 256.

Many of the cases last cited, like the California case, go to the extent of holding that the defect is waived by introducing evidence, even where the objection was made by demurrer in the court below. We need not go to that extent in the present case, and expressly reserve that question until it becomes necessary to determine it.

Respondent calls our attention to three Utah cases involving the question of defects cured by verdict. *Harkness v. McClain*, 8 Utah, 52, 29 Pac. 964; *Voorhees v. Manti City*, 13 Utah, 435, 45 Pac. 564; *Mangum v. Bullion, Beck & Champion Min. Co.*, 15 Utah, 534, 50 Pac. 834.

The case of *Harkness v. McClain*, in our opinion, is the only one of the three cases last cited which bears any similarity in principle to the case at bar; and, even in that case, which was an action upon a promissory note in which there was no allegation of notice to the indorser, it seems an answer was filed which raised the issue of notice. In every other respect the cases are similar. As we read the cases heretofore referred to we see no difference between raising the issue by answer where it was not presented by the complaint and raising it by the tacit consent of the parties during the course of the trial. Viewed in that light, the case of *Harkness v. McClain*, supra, is an authority in point.

We find no prejudicial error in the matter complained of. The judgment of the trial court is affirmed at cost of appellants.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

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Hess v. Udy et al., 55 Utah 248.

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## HESS v. UDY et al.

No. 3388. Decided November 13, 1919. (185 Pac. 367.)

1. ANIMALS—RESTRAINT AND DISPOSITION OF FOR TRESPASS. Laws providing for the restraint, sale, or disposal of animals for trespass and damage must be strictly followed.<sup>1</sup> (Page 248.)
2. ANIMALS—DELIVERY OF TRESPASSING ANIMALS TO POUNDKEEPER OF PRECINCT. Particularly in view of the alternative remedy given by Comp. Laws 1917, section 58, delivery of trespassing pigs by a landowner in F. precinct to the constable as ex officio poundkeeper in G. precinct was not a compliance with section 59, providing that the landowner who distrains trespassing animals shall deliver them within twenty-four hours "to the poundkeeper of the precinct," meaning the poundkeeper of the precinct in which the trespass was committed, and so rendered the landowner liable for conversion. (Page 251.)

Appeal from District Court, First District, Box Elder County; *J. D. Call*, Judge.

Action by Charles C. Hess against Hyrum Udy and W. A. Adams.

From judgment for plaintiff against defendant Udy, the latter appeals.

**AFFIRMED.**

*Le Roy B. Young*, of Brigham, for appellant.

*W. J. Lowe*, of Brigham, for respondent.

THURMAN, J.

This is an action for the conversion of two pigs alleged to be of the value of fifty dollars.

Plaintiff's ownership of the pigs at and prior to the date of

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<sup>1</sup> Citing *Nielsen v. Hyland*, 51 Utah, 334, 170 Pac. 778.



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the alleged conversion is admitted by defendant, but defendant attempts to justify the taking under the provisions of Comp. Laws Utah 1917, title 3, chapter 1, relating to estrays and trespassing animals. The trial court found the issues in favor of the plaintiff and against the defendant Udy. Judgment was entered accordingly. Defendant appeals on the judgment roll.

The defendant was the owner of land with crops growing thereon, in Fielding precinct, Box Elder county, and at the time of the wrongs complained of by plaintiff said pigs were found trespassing and doing damage upon said land. There being no poundkeeper in Fielding precinct, the defendant restrained the animals, and within twenty-four hours thereafter delivered them to the other defendant, W. A. Adams, poundkeeper of East Garland precinct of the same county. At the time of delivering the animals the defendant also delivered to the poundkeeper a certificate of appraisement of damage, as required by the statute, to which reference will be made. The animals were thereafter advertised and sold by the poundkeeper and the proceeds devoted to payment of the damages, costs, and expenses incurred, and the balance tendered to plaintiff and refused. The foregoing are the material facts found by the court.

Numerous errors are assigned by appellant, but the controlling question, and the only one that need be considered here, is: Did the poundkeeper of East Garland precinct have jurisdiction as poundkeeper to receive, hold, and dispose of animals for trespass committed on land and growing crops in Fielding precinct? If, under the circumstances named, the poundkeeper of East Garland precinct was without jurisdiction, the entire proceeding was unlawful, and the judgment of the trial court should be affirmed.

The doctrine is well established, if not elementary, that laws providing for the restraint, sale, or disposal of animals for trespass and damage must be strictly followed. We 1  
so held in a recent case decided by this court. *Nielsen*  
*v. Hyland*, 51 Utah 334, 170 Pac. 778. We have no reason to  
doubt that the doctrine therein enunciated is sustained by  
practically every well-considered case that has arisen in other

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jurisdictions of the country. 3 C. J. 82; 1 R. C. L. 1143-1145; *Barrett v. Lightfoot*, 1 T. B. Mon. (Ky.) 241, 15 Am. Dec. 110; *Newsom v. Hart*, 14 Mich. 235; *Weber v. Hartman*, 7 Colo. 13, 1 Pac. 230, 49 Am. Rep. 339; *Havaird v. Lung*, 19 Idaho, 790, 115 Pac. 930; *Mills v. Fortune*, 14 N. D. 460, 105 N. W. 235; 2 Cyc. 362d.

Comp. Laws Utah 1917, as far as material, provide:

Sec. 50. "The constable in each precinct in this state is hereby made ex officio the poundkeeper in such precinct, and is entitled to and is hereby made the custodian of all brand books and brand sheets pertaining thereto, which shall, at all reasonable hours, and without charge, be open to the inspection of the public."

Sec. 59. "The owner or occupant of any property may distrain all of said animals, trespassing or doing damage thereon. He shall, within twenty-four hours thereafter, deliver said animals to the poundkeeper of the precinct, together with a certificate of the appraisement of the damage done by such animals."

These are the controlling provisions in this particular case. Other provisions of the statute have more or less bearing, but they are not of sufficient importance to justify special consideration. The question is, Was a delivery of the animals to the poundkeeper of East Garland precinct for damages done in Fielding precinct a compliance with the provisions of section 59, *supra*? The effect of appellant's contention is that the words "the poundkeeper of the precinct," in section 59, should be construed as if they read "the poundkeeper of *any* precinct." (Italics ours.) If such were a correct interpretation of the statute, any poundkeeper in the state would have jurisdiction to receive and impound animals in any case, irrespective of the precinct in which the trespass was committed. Animals committing trespass in St. George precinct, near the south boundary line of the state, could be legally impounded in Logan precinct, near the north boundary line, and vice versa.

If there is any one thing more than another which tends to vex and harass the farmer or gardener, or to inflame his soul with an incurable resentment, it is to be subjected to the ravages of trespassing animals upon his growing crops. We are willing to concede that such an interpretation of the statute as appellant contends for would afford a splendid opportunity to

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the person injured by trespassing animals to wreak a summary vengeance, and thus to some extent appease his wrath and mollify his resentment. The injured party might well afford, especially in the case of animals habitually trespassing, to drive them once for all to the remotest precinct in the state, and there turn them over to the precinct poundkeeper, leaving the owner of the animals to look after their future. It may be said that this is a far-fetched illustration. So it is. Such a case would probably never happen even if appellant's interpretation of the statute were adopted, but it could happen, and the purpose of the illustration is to demonstrate that appellant's interpretation is unreasonable and unwarranted, even if the words of the statute did not preclude such interpretation. That the words "the poundkeeper of the precinct," in section 59, mean the poundkeeper of the precinct in which the trespass was committed we have no doubt whatever. It follows as a corollary from these conclusions that the poundkeeper of East Garland precinct had no authority to receive and impound the animals in question, and that the trial court was right in holding that the proceeding was unlawful. 2

Before concluding these remarks, without impropriety we may suggest that section 58 of the statutes heretofore referred to gives to the party injured by trespassing animals a remedy by action at law for damages, in which case it is provided that the animals trespassing shall not be exempt from execution. The instant case illustrates the wisdom of the Legislature in providing an efficient alternative remedy that can be resorted to at the option of the party injured. The defendant's error of judgment in the present case in electing to pursue the remedy he did, when there was no poundkeeper in the precinct where the trespass was committed, instead of prosecuting an action at law for damages, subjected himself to a hardship for which the law affords him no relief.

For the reason stated, the judgment is affirmed, at appellant's cost.

CORFMAN, C. J., and FRICK and WEBER, JJ., concur.

GIDEON, J. I concur in the order affirming the judgment.

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In re Slater's Estate, 55 Utah 252.

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In re SLATER'S ESTATE.

No. 3360. Decided November 14, 1919. (184 Pac. 1017)

1. **EXECUTORS AND ADMINISTRATORS—PREFERENTIAL RIGHT TO APPOINTMENT LOST BY DELAY.** Petitioner lost the preferential right given by Comp. Laws 1917, section 7596, to letters of administration of his father's estate, where he failed to appear within three months, as required by section 7598, but delayed nearly twenty-five years in applying for appointment, and then filed a cross-petition, objecting to the appointment of decedent's married daughter as being disqualified according to section 7600.<sup>1</sup> (Page 257.)
2. **EXECUTORS AND ADMINISTRATORS—REVIEW OF DISCRETION IN APPOINTMENT.** A son of deceased, by delay in applying for letters of administration having lost his preferential right of appointment given by Comp. Laws 1917, section 7596, the appointment of another who is competent will not be disturbed, where it does not appear that the court abused its discretion to his prejudice. (Page 257.)
3. **APPEAL AND ERROR—HARMLESS ERROR IN ADMISSION OF EVIDENCE.** The court on appeal cannot reverse for erroneous admission of testimony, where the admissible testimony is sufficient to sustain the court's judgment. (Page 258.)

Appeal from the District Court of Weber County, Second District; *A. E. Pratt*, Judge.

In the matter of the estate of Richard Slater, deceased.

From an order or judgment appointing Howell Slater administrator of the estate of said deceased, James Slater appeals.

**AFFIRMED.**

*Harris & Jensen*, of Ogden, for appellant.

*George Halverson*, of Ogden, for respondent.

**FRICK, J.**

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<sup>1</sup> *In re Owens' Estate*, 30 Utah, 351, 85 Pac. 277.

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Appeal from Second District.

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This is an appeal from an order or judgment made by the district court of Weber county appointing one Howell Slater administrator of the estate of Richard Slater, deceased.

A petition for the appointment of an administrator of the estate aforesaid was filed by one Elizabeth Condon, a daughter of the deceased, on the 24th day of January, 1918. The petitioner, among other things, alleged that Richard Slater died in Weber county, Utah, on or about the 25th day of November, 1893; that he left an estate "consisting of several small tracts of real property \* \* \* of the probable value of \$1,000," etc. The foregoing facts are not in dispute. She further stated in her petition the names, places of residence, etc., of all the heirs, together with all the necessary jurisdictional facts. She prayed that letters of administration be "issued to her or some other suitable and competent person." James Slater, appellant, on June 10, 1918, filed a cross-petition, in which he prayed that letters of administration be issued to him upon the grounds that he was the only surviving son of the deceased, that a majority of the heirs desired and requested that he be appointed administrator of said estate, and that the petitioner, Elizabeth Condon, is a married woman, and for that reason disqualified to act as administratrix of the estate.

A hearing was duly had upon the petition and cross-petition, pursuant to which hearing the court made findings and entered an order or judgment as follows:

"The petition of Elizabeth Condon, praying for letters of administration of the estate of Richard Slater, Sr., deceased, and the contest and cross-petition for letters of administration of James A. Slater, both coming on regularly to be heard this day, and due proof having been made to the satisfaction of the court that due and legal notice of the hearing of said petitions has been given by the clerk of this court, and it being proved by the oath of Elizabeth Condon that said Richard Slater, Sr., died on the 25th day of November, 1893, intestate, in the county of Weber, state of Utah, and that he was a resident of said county and state at the time of his death, and that he left estate in said county of the probable value of \$1,300, and that the rental value thereof is twenty-five dollars per annum, and the court having heard the evidence of the respective parties, and it appearing therefrom that neither the petitioner nor cross-petitioner should be appointed, but that Howell

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Slater is a fit and proper person to be appointed administrator of the estate of the said Richard Slater, Sr.: It is ordered that letters of administration upon the estate of said Richard Slater, Sr., deceased, be issued to the said Howell Slater upon his taking the oath and filing a bond according to law in the penal sum of \$2,000.

"Dated September 14, 1919."

The material errors assigned are: (1) That the court erred in appointing Howell Slater administrator; and (2) that it erred in refusing to appoint the appellant. These two assignments raise the same question. There are two other assignments to which reference will be made hereafter.

Appellant insists that under our statute it was the duty of the court to appoint him, in view that he was the son of the deceased and was competent to act. Comp. Laws Utah 1917, section 7596, fixes the right of priority of appointment as follows: (1) Surviving widow or husband; (2) the children; (3) the father or mother; (4) the brothers and sisters; (5) grandchildren; (6) the next of kin. Section 7597, among other things, provides:

"When there are several persons equally entitled to administration, the court may grant letters to one or more of them. \* \* \* If a dispute arises as to relationship between applicants, or if there is any other good and sufficient reason, the court may appoint any competent person." (*Italics ours.*)

Section 7598 reads as follows:

"Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear within three months after the death of the decedent and claim the issuance of letters to themselves."

Section 7599 is immaterial here, and section 7600, so far as material, provides that in case any person who is interested in an estate objects to the appointment of a married woman, she "must not be appointed administratrix."

Appellant's counsel, in their brief, state the gist of their contention thus:

"James A. Slater is both 'suitable' and 'competent,' and we contend that upon his cross-petition he was entitled to letters, as a matter of right."

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That contention, it seems, is based upon the decision in the case of *In re Owens' Estate*, 30 Utah, 351, 85 Pac. 277. The question which necessarily controls the case at bar was, however, not involved in that case, and hence was not, and could not, have been decided. In that case the application was made by one who did not come within any of the classes mentioned in section 7596 and was made before the three-month period provided for in section 7598, *supra*, had expired. It was accordingly held in the Owens Case that the sister of the deceased, who came within the preferred class mentioned in section 7596, had the superior right, and the order of the court appointing another who did not come within the preferred class was reversed. A mere cursory reading of the opinion written by Mr. Chief Justice BARTCH, however, clearly shows that the question here presented was not considered, and that the conclusion there reached was entirely based upon the fact that the appellant in that case came within the preferred class, and that the application of the respondent in that case was made before the period of time had elapsed within which a preferential right existed. In this case, however, the intestate died in November, 1893, and no application for the appointment of an administrator was made until March, 1918, or nearly twenty-five years after the death of the intestate.

Counsel for respondent contends, stating his contention in his own language:

"The provisions of section 7598 require persons entitled, or having better rights to administration, to make application within a reasonable time for such appointment, and, if they fail to make such application, letters should be granted to any qualified applicant."

That states the law more favorable to the appellant than it is stated in section 7598. That section provides that in case those who have preferential rights to the administration "fail to appear within three months after the death of the decedent and claim the issuance of letters to themselves," then letters "must be granted to any applicant." Of course that implies that such applicant be a competent person to act as administrator.

In view of the conceded facts in this case, therefore, James

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Slater, the appellant here, had clearly forfeited or lost his preferential right. Upon that question the decisions of the courts under statutes like ours are in perfect harmony. The general rule is well and tersely stated by Church in his New Probate Law and Practice, vol. 1, at page 384, in the following words:

"Under statutes giving to certain persons the preference, right to letters of administration, and limiting the time within which such preferred persons may, apply, it is generally held that such preference is lost, by failure to apply within the time fixed by the statute."

In 1 Woerner, The American Law of Administration, at section 243, the law is stated thus:

"The preference given by statute may be waived or renounced.  
\* \* \* The renunciation may be spontaneous, or upon citation of some person interested; and it will be presumed—that is, the exclusive right to administer will be deemed—to have been waived, if letters are not applied for by the party preferred within the period prescribed for such purpose by statute."

The same doctrine is stated in 11 R. C. L. section 22, page 35.

The following authorities fully sustain the text quoted from Church and Woerner: *Forester v. Forester*, Adm'r, 37 Ala. 398; *Wheat v. Fuller*, 82 Ala. 572, 2 South. 628; *Atkinson v. Hasty*, 21 Neb. 663-666, 33 N. W. 206; *Withrow v. De Priest*, 119 N. C. 541, 26 S. E. 110; *In re Sprague's Estate*, 125 Mich. 357, 84 N. W. 293; *Rodes v. Boyers*, 106 Tenn. 434, 61 S. W. 776; *Rice v. Tilton*, 13 Wyo. 420, 80 Pac. 828; *In re Sutton's Estate*, 31 Wash. 340, 71 Pac. 1012; *McLean v. Roller*, 33 Wash. 166, 73 Pac. 1123, 1124; *Ramp v. McDaniel*, 12 Or. 108, 6 Pac. 456; *In re Miller*, 32 Neb. 480, 49 N. W. 427.

In the case of *Withrow v. De Priest*, supra, the court, in the course of the opinion, said:

"The plaintiff's present application was made subsequent to December 5, 1895. The subject of granting letters of administration, etc., is regulated by Code, chapter 33. Preference is given to certain persons successively, provided they assert their rights within the time prescribed by law. Public policy and the rights of distributees and creditors require that the estates of deceased persons be settled within a due and reasonable time. If those that have the preference



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fail to act within six months (section 1394) they must be taken to have renounced or waived their rights. As the question has been fully considered and decided in this court, we need not pursue it any further. *Hill v. Alsbaugh*, 72 N. C. 402; *Garrison v. Cox*, 95 N. C. 353."

In 18 Cyc. 84, it is said:

"Where all the persons who under the statute have a right to administer have renounced or otherwise lost their right, the court has a considerable discretion in the appointment of the administrator."

Such must necessarily be the law, and to that effect are the authorities."

In the case at bar all those who are given a preferential right under section 7598 manifestly forfeited or lost the same by delaying nearly twenty-five years before applying for the appointment of an administrator to administer the estate, and it seems that if Mrs. Condon, who seems to hold the largest interest in the estate, had not then applied, none of the other interested parties would have done so. Indeed, the appellant waited for almost five months after Mrs. Con- 1 don had filed her petition before he filed a cross-petition. The right insisted upon by appellant, therefore, is not only contrary to all the authorities, but is in the very teeth of section 7598, which expressly provides that in case those having the preferential right fail to come into court within three months after the death of the decedent, and ask that letters be issued to them, letters of administration must be granted to any applicant.

In any view that can be taken, therefore, appellant had lost his preferential right to be appointed administrator, and even though he was still qualified to act, yet his 2 right to do so was no greater than the right of any other competent person. The district court was thus vested, as stated in Cyc., supra, with "considerable discretion in the appointment of the administrator." There is not a word of complaint that Howell Slater is not a competent person, or that there was any irregularity in making his appointment such as would constitute prejudicial error affecting any substantial right of the appellant. The district court having

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discretion in the matter, we cannot reverse its rulings, unless it is made to appear that it has abused that discretion to the prejudice of a substantial right of the appellant. This record discloses nothing of that character.

It is, however, insisted that the court erred "in permitting the petitioner to testify as to an oral agreement with James Slater." Even though the court had erred in 3 admitting the evidence, yet, in view that the evidence is otherwise sufficient to sustain the court's judgment, we may not, as this court has repeatedly held, for that reason reverse the judgment. The testimony of the petitioner is that regard was therefore not prejudicial to the rights of the appellant. As we have seen, appellant lost his preferential right, and hence the court, under our statute, had the power to appoint any other suitable and competent person. If such person is suitable and competent to administer the estate, appellant clearly is not prejudiced in any substantial right.

The judgment is affirmed, with costs to respondent.

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### RETEUNA v. INDUSTRIAL COMMISSION.

No. 3397. Decided November 14, 1919. (185 Pac. 535.)

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT CONSTITUTIONAL. The constitutional right of the Legislature to enact a workmen's compensation law, having not only the object to secure compensation to an injured employé, or those dependent upon one killed by accident, but to relieve society of the care and support of the victims of industrial accidents, is not open to question.<sup>1</sup> (Page 263.)
2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—REVIEW OF DETERMINATION OF COMMISSION AS TO COMMUTATION. In view of the objects of the Workmen's Compensation Act, embracing the protection of society as well as the protection of the injured employé or his dependents, the authority and discretion of the

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<sup>1</sup> *Industrial Commission v. Daly Min. Co.*, 51 Utah, 602, 172 Pac. 301; *Industrial Commission v. Evans*, 52 Utah, 394, 174 Pac. 825; *Garfield Smelting Co. v. Industrial Commission*, 53 Utah, 133, 178 Pac. 57.

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Prayer for Certiorari. Writ Denied.

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Industrial Commission, as the authorized agent of the state, in determining whether the interests of the parties would be subserved best by commutation of compensation or payment in a lump sum pursuant to Comp. Laws 1917, section 3145, is absolute, and not subject to review by the courts. (Page 265.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—DENIAL OF COMMUTED COMPENSATION. Refusal by the Industrial Commission to approve a commuted or lump sum settlement with an injured employé rendered insane by the accident, in view of the possibility that the employé might recover, etc., *held* not arbitrary and unlawful. (Page 265.)
4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—APPROVAL BY DISTRICT COURT OF LUMP SUM SETTLEMENT. In view of Comp. Laws 1917, section 3146, of the Workmen's Compensation Act, order of the district court, authorizing the guardian of an injured employé, rendered insane by the accident, to make a commuted or lump sum settlement with the employer, and to execute a release, *held* not even prima facie evidence of the reasonableness of the settlement, which, even in the absence of contrary evidence, the Industrial Commission was not under duty to approve, it not being within the authority of the district court to direct the guardian with respect to the amount of the compensation to be received, or when and how it should be received; such matters being within the control of the Industrial Commission. (Page 266.)
5. MASTER AND SERVANT—WORKMEN'S COMPENSATION—REVIEW OF COMMISSION'S DETERMINATION OF FACT. Where there was testimony to support the conclusion of the Industrial Commission on a question of fact, the Supreme Court will not review the commission's finding.<sup>2</sup> (Page 266.)

Original action by Barto Reteuna, guardian of Domineck Barda, to review compensation proceedings before the Industrial Commission of the State.

WRIT OF REVIEW DENIED, and petition dismissed.

*Evans & Sullivan*, of Salt Lake City, for plaintiff.

*Dan B. Shields*, Atty. Gen., and *J. H. Wolfe*, *O. C. Dalby*, and *Herbert Van Dam, Jr.*, Asst. Attys. Gen., for defendant.

<sup>2</sup> *Industrial Commission v. Evans*, 52 Utah, 394, 174 Pac. 825.

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Reteuna v. Industrial Commission, 55 Utah 258.

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GIDEON, J.

This is an original action in this court, asking for a review of certain proceedings before the Industrial Commission of this state in an action entitled *Barto Reteuna as Guardian of the Person and Estate of Domineck Borda, an Injured Employé, Plaintiff, v. Independent Coal & Coke Co.*

The facts out of which this controversy arose are as follows: On or about April 1, 1918, one Domineck Borda was employed by the Independent Coal & Coke Company in Carbon county. On said date he was injured during the course of his employment, and the accident causing the injury arose out of such employment. These facts are not in dispute, but are admitted by both parties. As a result of such injury the mind of said Borda became deranged to such an extent that he is mentally incompetent. On or about April 12, 1919, the district court of Carbon county appointed plaintiff, Reteuna, guardian of the person and estate of Borda, and thereafter such guardian filed an application with the Industrial Commission, defendant here, asking for an award for said injury under the Workmen's Compensation Act of Utah. Comp. St. 1917, tit. 49. A hearing was regularly had on said petition on or about April 30th of that year. On May 26, 1919, an order was made, awarding to the petitioner therein twelve dollars per week, and directing the Independent Coal & Coke Company to pay the applicant as such guardian that amount from and including April 12, 1918, that being ten days after the injury, "until such date as the commission shall by proper order change, modify, or discontinue such compensation, less the sum of \$648, theretofore received by the applicant." It further appears that on or about August 23, 1919, said guardian presented his verified petition to the district court of Carbon county, in which it was set out that the Independent Coal & Coke Company had in writing offered to pay the petitioner, as guardian aforesaid, a lump sum of \$2,500 as full compensation for the injuries received by his ward while in the employ of the coal and coke company. It was likewise represented to the court that in the guardian's judgment it

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Prayer for Certiorari. Writ Denied.

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would be better for the interests of the incompetent and of the state of Utah that such offer of settlement be accepted. The district court thereupon made an order, authorizing and permitting the guardian to make such settlement with the coal and coke company, and upon the payment by it of \$2,500 to execute a full release and discharge of said company from any and all claims growing out of the injury to said Borda. Thereafter, on or about August 28, 1919, plaintiff herein, as guardian, filed his petition with the Industrial Commission, defendant herein, setting forth his appointment as guardian, the award made by the commission May 26, 1919, and the further fact that the Independent Coal & Coke Company had in writing offered to pay in full settlement of all claims for the injuries sustained by the incompetent the sum of \$2,500, and that he had been authorized and empowered by the district court of Carbon county to accept said offer and to execute and deliver a full release to said company. Such facts were stated in a verified petition, and apparently no further testimony or hearing was had by the commission on said petition. On September 9, 1919, the commission denied the petition. Thereafter this application was made to this court to review the proceedings of the commission in its refusal to approve and authorize the settlement, and praying that an order issue, directing the commission to vacate its order of September 9, 1919, and to enter an order approving said settlement in conformity with the order of the district court of Carbon county. It was claimed in the application that it would be to the best interests of society, the people of the state, and the said incompetent that said settlement be approved, and that the commission, in denying the right of the guardian to make such settlement in conformity with the order of the district court, "acted without authority, and in an arbitrary, wrongful and unlawful manner, and to the prejudice of the people of the state of Utah and the said incompetent. \* \* \*

The Industrial Commission by its answer admitted the proceedings had before it as herein stated; admits that by its order it refused to approve or authorize a settlement by the payment of a lump sum of \$2,500, but denies the authority of

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the district court of Carbon county to make an order binding upon it. It also denies that it would be to the best interests of the incompetent or of the people of this state that such settlement be affirmed by the commission, and denies that in refusing to approve said settlement it exceeded its jurisdiction or acted in an arbitrary, wrongful, and unlawful manner. It avers that it had authority under the provisions of the Workmen's Compensation Act to commute compensation into a lump sum if in its discretion it was deemed best so to do, but that no commutation or settlement can be made without the approval of the commission, and that it has control and continuing jurisdiction of the compensation awarded, and that its findings and conclusions as to whether commutation or settlement should be allowed are final and not subject to review.

The answer having admitted all of the allegations of the petition respecting the proceedings and orders made by the commission left no material issue of fact in dispute. To the affirmative allegations of the answer, which really stated conclusions of law only, a demurrer was filed by the plaintiff, and the matter was argued and submitted upon the issues presented by the pleadings.

The application for review filed in this court is under the provisions of Comp. Laws Utah 1917, section 3148, as amended by chapter 63, Laws Utah 1919. That section as amended provides that within thirty days after the final decision of the commission on an award any one affected by the order of the commission may apply to the Supreme Court for a writ of certiorari or review. It is also therein provided that the review shall extend no further than "to determine whether or not: (1) The commission acted without or in excess of its power; (2) if findings of fact are made, whether or not such findings of fact support the award under review." It is further provided in that section as amended that the findings and conclusions of the commission on questions of fact "shall be conclusive and final and shall not be subject to review; such question of fact shall include ultimate facts and the findings and conclusions of the commission." The other

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subdivisions of the section provide that the Code of Civil Procedure, relating to writs of review, shall, so far as applicable and when not in conflict with the other provisions of the act, apply to the proceedings in the courts under that section, and that no court save the Supreme Court shall have jurisdiction to review, reverse, or annul any award, etc. It will thus be seen that the questions presented by this record for determination are: First, has the applicant, after having filed his claim for an award under the provisions of the Workmen's Compensation Act, the right to make settlement with his employer without the approval of the commission? and, second, if the applicant has no such right, is the action of the commission in either approving or refusing to approve such voluntary settlement thus made subject to review by this court?

No question is presented respecting the right of the injured employé to receive compensation, nor or the liability of the Independent Coal & Coke Company to pay such compensation.

The constitutional right of the Legislature to enact a workmen's compensation law is no longer open to question. Many of the provisions and sections of this statute have 1 been considered by this court in at least three different decisions: *Industrial Com. v. Daly Min. Co.*, 51 Utah 602, 172 Pac. 301; *Garfield Smelting Co. v. Industrial Com.* 53 Utah 133, 178 Pac. 57; *Industrial Com. v. Evans*, 52 Utah 394, 174 Pac. 825. The beneficent purposes of the act, and of similar acts, have been repeatedly stated by the courts of this and other states. It has not only for its object to secure compensation to an injured employé or to those dependent upon one killed by accident while so employed, but to relieve society of the care and support of the unfortunate victims of industrial accidents. This thought has been so well stated by the Ohio Industrial Commission in *Rosensteel v. Niles Forge & Mfg. Co.*, reported in 7 Neg. & Comp. Cases Ann. 798, that liberty is here taken to quote from that decision as follows:

"The theory of workmen's compensation is based largely upon the doctrine that society itself is vitally concerned in the prompt

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payment of compensation to injured and the dependents of killed employes. It is a matter relating to the promotion of the general welfare. \* \* \* The Industrial Commission is the instrumentality through which the state acts, and it is its duty, not only to ascertain all of the facts and determine the amount of compensation to which a claimant is entitled, but to pursue the matter to final judgment in the event the employer refuses to pay. In other words, the state, as the representative of society at large, steps in and takes charge. Such being the case, it follows that the individual claimants, not being solely interested, cannot enter into a release which will be binding without the consent of the state through the action of the Industrial Commission."

To the same effect is the decision of the Supreme Court of Michigan in the case of *Estate of Beckwith v. Spooner*, 183 Mich. 323, 149 N. W. 971, Ann. Cas. 1916E, 886.

Section 3138 of the act provides when compensation shall be received by an employé for partial disability, and that such compensation shall be a weekly allowance. Section 3144 defines the powers and jurisdiction of the commission as follows:

"The powers and jurisdiction of the commission over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto as in its opinion may be justified."

Section 3145, relating to the authority of the commission to commute payments, is as follows:

"The commission, under special circumstances, and when the same is deemed advisable, may commute periodical benefits to one or more lump sum payments."

It will thus be seen that the commission is charged with the duty of fixing the compensation to be received by an injured employé. Also, that, after having made such award, the commission, under section 3144, supra, has continuing power and authority to modify or change such order of award as in its opinion may be justified. By the provisions of section 3145, under special circumstances, when deemed advisable, it may commute the periodical payments to one or more lump sum payments. Considering the objects sought to be accomplished by the enactment, that it is not damages as ordinarily understood to be paid by the negligent employer for an injury to an employé, but that it is compensation to



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Prayer for Certiorari. Writ Denied.

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protect the injured party and those dependent upon him regardless of the question of negligence, and that the state is an interested party, then it must necessarily follow that the authority and discretion of the commission, as the authorized agent of the state, in determining whether the interests of the parties concerned in any particular case would 2 be best subserved by a commutation or payment in a lump sum, must be absolute, and not subject to review by the courts. In other words, the question for determination is one of discretion under all the peculiar circumstances of the particular case, and must be so considered, and each case determined upon the particular facts surrounding it. It is not a question, as pointed out by the Attorney General, of evidence or the weight of evidence. It must be assumed that the commission, in making the original award, familiarized itself with the facts surrounding the applicant, his particular needs, and, based upon such facts, made its decision that the payments should be made periodically as authorized by the act.

In addition, under the particular facts as presented by the record, even if we considered it a matter that the court should review, we are not prepared to say that the acts of the commission were arbitrary and unlawful. It appears from the record that the injured employé is an Italian, that he is mentally incapacitated by the accident, and that it is wholly uncertain as to how long the incompetency will last, or what form or degree such incompetence or insanity may take. While it is true that the duty of the commission 3 is to protect the injured as well as the state, it is also true that it is incumbent upon the commission to see that no employer shall be imposed upon or required to make payment to an injured employé for any greater length of time than such injury may continue. From the evidence, it was impossible for the commission to tell or determine for what length of time the injury might continue. The injured employé was thirty-five years of age at the time of accident, and it is possible that he may in a very short time recover from the effects of the injury and be able to earn a livelihood and to continue the employment in which he was engaged at the time of the accident. If such proves to be the case, it would

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be manifestly unjust that the employer should continue to make payments, or should at this time pay an amount greater than would be the total of the periodical payments.

It is contended by counsel for plaintiff that the order of the district court of Carbon county authorizing and empowering the guardian to make the settlement and to execute a release, if not binding upon the commission, was at least prima facie evidence of the reasonableness of the settlement, and that in the absence of any evidence to the contrary it was incumbent upon the commission to authorize the settlement as directed by the district court. In that we think the petitioner is in error. The fund to be paid for the injury is in no sense an estate to be administered by a guardian as usually understood in the handling of estates belonging to incompetents and minors. Section 3146 of the act in question provides:

"Compensation before payment shall be exempt from all claims of creditors and from any attachment or execution, and shall be paid only to such employes or their dependents."

It follows from that section that the only jurisdiction the district court had, or could have, over the fund in question is to see that it is applied by the guardian for 4 the support and benefit of the injured employé or his dependents. It was not within the authority of the court to direct the guardian respecting the amount of the compensation to be received, or when and how it should be received. These matters were wholly within the control and jurisdiction of the commission.

Considering the entire record, there is ample testimony to support the conclusion of the commission to refuse to approve the settlement, considered purely as a question 5 of fact; and, there being such testimony, this court will not review the commission's findings. In *Industrial Commission v. Evans*, 52 Utah 394, 174 Pac. 825, at page 832, this court, speaking through Mr. Chief Justice FRICK, in discussing the right of all parties interested to be heard before the commission concerning the facts upon which the ultimate liability of the employer is based, said:

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Prayer for Certiorari. Writ Denied.

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"When those questions do not arise—and they necessarily can arise only in a few and exceptional instances—the findings and orders of the commission respecting the amount, terms, time, and condition of payment and the nature and extent of the injuries are necessarily final, and not subject to review by the courts."

If it be contended that the conclusions herein reached of necessity abridge the freedom of contract, it is sufficient answer that the authority of the Legislature to enact a workmen's compensation law is no longer open to question; that the provisions of such law, if constitutional, enter into and become a binding part of all contracts made between employers and employes. By the provisions of section 3151 of the act any agreement made in advance between an employer and an employé, releasing or limiting the liability of the employer in the event of injury, is not binding. The interests of society in the working of the act in question that will not permit a waiver of the right for compensation is also sufficient to prevent the settlement or payment of such compensation in any other manner except as provided by the act, and as may be lawfully determined by the commission under its provisions.

It follows that the writ should be denied, and the petition dismissed. Such is the order.

CORFMAN, FRICK, WEBER, AND THURMAN, JJ.,  
concur.

Thornton et al. v. Evans, Judge, et al., 55 Utah 268.

THORNTON et al. v. EVANS, Judge, et al.

No. 3408. Decided November 20, 1919. (185 Pac. 454.)

1. PROHIBITION—HEARING OF PREMATURE APPEAL. Prohibition is the proper remedy to prevent the district court from hearing an appeal from a city court taken prematurely.<sup>1</sup> (Page 270.)
2. APPEAL AND ERROR—DISMISSAL OF PREMATURE APPEAL. An appeal taken prematurely is of no avail, and should be dismissed on application.<sup>2</sup> (Page 270.)
3. COURTS—PREMATURE APPEAL FROM CITY TO DISTRICT COURT. Under Comp. Laws Utah, 1917, section 7514, where no judgment was actually entered in the city court until January 9th, notice and undertaking on appeal filed by defendant the preceding December 9th were premature and ineffectual for purposes of an appeal to the district court, despite a stipulation of the parties that the clerk might enter judgment dated nunc pro tunc as of November 26th.<sup>3</sup> (Page 271.)

Application for prohibition by C. E. Thornton and others against P. C. Evans, as Judge of the District Court of Salt Lake County, and J. M. Thomas.

Alternative writ ordered to be made permanent.

Ben F. Johnson, of Salt Lake City, for plaintiffs.

J. M. Thomas, of Salt Lake City, for defendants.

CORFMAN, C. J.

September 30, 1918, J. M. Thomas commenced an action in the city court of Salt Lake City against C. E. Thornton et al., for the recovery of a money judgment. Said cause was duly

<sup>1</sup> *State ex rel. Grant v. First Judicial District Court et al.*, 38 Utah, 138, 110 Pac. 981, Ann. Cas. 1913B, 437; *State ex rel. Walton v. Third Judicial District Court of Salt Lake Co.*, 36 Utah, 502, 105 Pac. 105; *Parker, County Attorney, v. Morgan, Dist. Judge*, 48 Utah, 405, 160 Pac. 764.

<sup>2</sup> *Robinson v. Salt Lake City*, 37 Utah, 520, 109 Pac. 817; *Lukich v. Utah Const. Co.*, 46 Utah, 317, 150 Pac. 298.

<sup>3</sup> *Anderson v. Mercantile Co.*, 30 Utah, 31, 83 Pac. 560.

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tried in said court November 18, 1918, and thereupon taken under advisement by the judge thereof until November 23, 1918, when said court rendered its decision orally in favor of defendants.

On December 9, 1918, before any findings of fact, conclusions of law, or any judgment had been prepared and signed in said cause, the plaintiff therein filed a notice and undertaking on appeal to the district court for Salt Lake county. Thereafter, January 9, 1919, and before any judgment had been entered in said city court, the respective parties to said cause stipulated in writing therein as follows:

"It is hereby stipulated by and between the plaintiff and the defendants herein that findings of fact and conclusions of law are hereby waived herein, and the clerk may enter the judgment made by the court without any findings of fact, conclusions of law, or judgment signed by the court and dated *nunc pro tunc* as of November 26, 1918."

After the filing of said stipulation in the city court, January 9, 1919, a judgment was reduced to writing pursuant to said stipulation, and entered (as we may assume, although there is no record before us to so show) in said cause as of date November 26, 1919, and on January 10, 1919, the clerk of said court transmitted the files in said cause to the Third district court for Salt Lake county, whereupon the defendants in said cause moved said district court to dismiss the appeal for want of jurisdiction, upon the ground that the same had been prematurely taken, which motion was denied. It is further made to appear by the affidavit and petition presented to this court on application for a writ of prohibition that said district court now assumes jurisdiction of said cause, and will, unless restrained by order of this court, proceed to try the same.

Upon the showing thus made before this court an alternative writ was issued. The defendants herein filed an answer in which the foregoing facts are admitted. The answer also denies the allegation of the plaintiffs that the district court is without jurisdiction to proceed with said cause, and also affirmatively alleges that the plaintiffs have an adequate, plain, and speedy remedy at law in said district court. It is

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also alleged, in substance and effect, by the answer herein, that the term of office of the trial judge, before whom the said cause had been tried in the city court, expired November 26, 1918, before findings of fact, conclusions of law, or judgment had been prepared and signed by said judge, and thereupon the respective parties entered into the stipulation hereinbefore set forth that a judgment might be entered by the clerk in form and manner aforesaid as of November 26, 1918, so that the defendants in said cause might have a judgment entered in accordance with the oral decision of the said judge, and for the further purpose of obviating the necessity of the plaintiff filing a new notice and undertaking on the appeal thus prematurely taken in said cause to the district court.

As we view the case before us on application for writ of prohibition, there is but one question for us to decide, Is the attempted appeal taken by the plaintiff in said 1, 2 cause from the city court to the district court valid, so that the district court may assume jurisdiction and legally proceed to try the case upon its merits? Some claim, however, is made by the answer that the plaintiffs have a plain, speedy, and adequate remedy in the district court, and therefore prohibition is not the proper remedy. We think the following cases are controlling, and fully determine that in cases of the character under consideration this court stands committed that prohibition is the proper remedy. *State ex rel. Grant v. First Judicial District Court et al.*, 38 Utah, 138, 110 Pac. 981, Ann. Cas. 1913B, 437; *State ex rel. Walton v. Third Judicial District Court of Salt Lake Co.*, 36 Utah, 502, 105 Pac. 105; *Parker, County Atty. v. Morgan, Dist. Judge*, 48 Utah, 405, 160 Pac. 764. It is equally well settled in this and other jurisdictions that if an appeal is taken prematurely it will be of no avail, and upon application should be dismissed. *Robinson v. Salt Lake City*, 37 Utah, 520, 109 Pac. 817; *Lukich v. Utah Const. Co.*, 46 Utah, 317, 150 Pac. 298; Hayne, New Trial and Appeal, vol. 2, section 204 (Rev. Ed.).

In the authority last cited, where the decisions from the several state courts bearing on the question are collated, it is said:

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"An appeal under our practice is purely the creature of statute. \* \* \* Whether taken too early or too late, appeals, or attempted appeals, taken otherwise than in the manner or within the time prescribed by the Code, may be said to be abortive. They accomplish nothing. Such an appeal not only does not take the case to the higher court, but it really leaves it undisturbed in the trial court, just as though no attempt had been made to remove it. \* \* \*"

The same author, in speaking of the date or time from which an appeal may be taken, further says:

"From the statutory provisions it is to be noticed that the time to take an appeal from a judgment begins to run from the actual entry thereof in the judgment book, and from orders, from the date of entry in the minutes, if made in open court. \* \* \* When a judgment has been entered *nunc pro tunc* as of a prior date, the time to appeal begins to run from the date of the actual entry." Section 205, and cases cited in note 9." Comp. Laws Utah, 1917, section 7514; *Lukich v. Utah Const. Co.*, 48 Utah, 453, 160 Pac. 270.

It being an admitted fact that no judgment was actually entered in the city court until January 9, 1919, the notice and undertaking on appeal filed by the defendant 3 December 9, 1918, must be held as premature and ineffectual for the purposes of an appeal to the district court, regardless of the purport of the stipulation of the parties. *Anderson v. Mercantile Co.*, 30 Utah, 31, 83 Pac. 560.

It necessarily follows that the district court has no jurisdiction to proceed with the trial of the case on its merits, nor to do more than dismiss the pretended appeal for want of jurisdiction.

It is therefore ordered that the alternative writ of prohibition heretofore issued by this court be made permanent, and the costs of this proceeding be taxed to the defendant J. M. Thomas.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

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ERNST v. ALLEN et al.  
ALLEN et al. v. LANGFORD.

No. 3380. Decided November 21, 1919. (184 Pac. 827.)

1. EASEMENTS—"EASEMENT APPURTENANT." An "easement appurtenant" or easement proper is a privilege which the owner of one tenement has the right to enjoy in respect to that tenement, in or over the tenement of another person, involving the idea of two distinct tenements, a dominant estate, to which the right is accessorial, and a servient estate, on which it is a burden or charge (citing Words and Phrases, Easement). (Page 277.)
2. EASEMENTS—"EASEMENT IN GROSS." An "easement in gross" is a mere personal interest in the real estate of another, not assignable or inheritable, and being so exclusively personal that the owner cannot take another person in company with him (citing Words and Phrases, Easement in Gross). (Page 277.)
3. EVIDENCE—CONSTRUCTION OF AMBIGUOUS INSTRUMENT IN VIEW OF CIRCUMSTANCES AND SITUATION. An instrument attempting to create an easement should be read in the light of surrounding circumstances, the situation of the parties, and property involved, where the language used is ambiguous and apparently contradictory. (Page 280.)
4. EASEMENTS—USE OF WORDS OF INHERITANCE IN CREATING EASEMENT APPURTENANT. If the words "heirs and assigns" are used in making a reservation of easement where the grantor in fact retains no land that can be benefited by the easement, the use of the words does not create an easement appurtenant, the element of a dominant estate being lacking, and it is only an easement in gross; but if the deed reserving easement refers to no land of the grantor to which the easement can be appurtenant, but such land exists or existed, the fact of its existence may be established to give effect to the words used. (Page 282.)
5. EASEMENTS—RESERVATION OF EASEMENT APPURTENANT WITHOUT DESCRIPTION OF RETAINED LAND. Where the owner of a tract of land conveyed part of it, reserving to herself, her heirs and assigns, an equal right with the grantee, his heirs and assigns, to a right of way for vehicles, foot passengers, animals, etc., over a strip of land between that conveyed and that retained, the easement thus created was appurtenant to the retained land, though such retained land was not described by the conveyance. (Page 283.)

Appeal from District Court of Salt Lake County, Third District; *P. C. Evans*, Judge.



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Appeal from Third District.

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Consolidated actions by Helen D. Ernst against William Allen and others and by William Allen and others against Mrs. Helen Langford.

From decree for plaintiffs and defendants Allen and others, Ernst and Langford appeal.

CASE REMANDED, with directions to modify decree in accordance with views herein expressed, and JUDGMENT AS MODIFIED AFFIRMED.

*Young & Moyle*, of Salt Lake City, for appellants.

*Soren X. Christensen* and *Thomas Ramage*, both of Salt Lake City, for respondents.

THURMAN, J.

This is a controversy concerning an alleged right of way, hereinafter referred to as an "alley," ten feet wide and ten rods long, lying between and adjacent to other lands owned respectively by the parties litigant.

Each of the parties plaintiff and defendant commenced an action against the other to quiet title to the strip of land in question and for injunctive relief. At the trial, the actions were consolidated and tried together. The trial court found the issues in favor of respondents Allen et al., and a decree was entered in accordance with the findings. This appeal is taken to reverse the judgment. Numerous errors are assigned. The material facts, however, are not in dispute, and, in our opinion, the whole controversy is determinable as a question of law dependent upon the construction of one or two deeds of conveyance made and executed by the common ancestor of the parties to this action.

The common ancestor, Jane Elizabeth James, formerly owned the entire property now owned by appellant and respondents, including the alley in dispute. The land so owned by Mrs. James is situated on lot 5, block 36, plat A, Salt Lake

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City survey, fronting west on the east side of Second East street between Fifth and Sixth South.

In April, 1888, Mrs. James, by warranty deed, conveyed to one Eliza Shafer, predecessor in interest of appellant, a portion of said land described as follows:

"Beginning fifty feet north of the S. W. corner lot 5, block 36, plat A, Salt Lake City survey, thence north thirty-eight feet, thence east ten rods, thence south thirty-eight feet, thence west ten rods to the beginning, reserving to the said party of the first part, heirs and assigns, an equal right with the said party of the second part, heirs and assigns, to a right of way for all manner and kind of vehicles, foot passengers, animals, loaded or not, over the following described land, to wit: Beginning seventy-eight feet north of the S. W. corner of lot 5, north ten feet, east ten rods, south ten feet, west ten rods to beginning."

The strip of ground last described as a right of way is the ground in controversy. Eliza Shafer subsequently conveyed the same property, including the alley, to one Isaac Brockbank. Mrs. James joined in this conveyance, still reserving a right of way to herself, her heirs and assigns.

At the time of the execution of these conveyances, Mrs. James was the owner of, and retained ownership of, a small parcel of the land lying north of the alley and abutting thereon, described as follows:

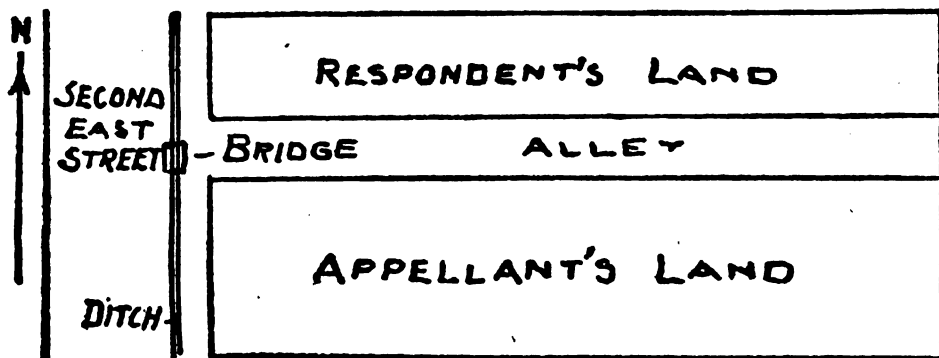
"Commencing at a point eighty-eight feet north from the S. W. corner of lot 5, block 36, plat A, Salt Lake City survey, north fifteen feet one and one-half inches; east ten rods; south fifteen feet one and one-half inches; west ten rods to beginning."

This is the land now owned by respondents. The entire width of this parcel, fronting on Second East street, is, and ever since before Mrs. James made the conveyance referred to has been, occupied by a building used for residence or business purposes. It extended back fifty or seventy-five feet. Back of this were sheds where the owner or occupants of the building kept their wood for fuel. On the land now owned by appellant on the south side of the alley, there were, during all the times mentioned, two or more buildings used for residential purposes. The first building fronted west on Second East street and was flush with the south boundary line of the alley. The other building was in the rear. The space be-

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tween the front buildings on each side of the alley was only ten feet wide, the designated width of the alley. A ditch extended north and south on the outer edge of the sidewalk in front of the buildings, and during all the times mentioned this ditch was crossed by a bridge leading into the alley. At all times covered by the evidence in the case the alley was used as a right of way in common by the parties litigant and their predecessors in interest. As to whether or not the right of respondents and their predecessors in interest was disputed or acquiesced in by the owners and occupants on the south side of the alley, the evidence is conflicting, and we deem it unnecessary to attempt a determination of that question. The evidence, however, does satisfactorily establish the fact that the alley was used by Mrs. James in her lifetime and by her successors afterwards, for the purpose of carrying or conveying to the rear of her building coal, wood, groceries, and other articles; and the alley was not only convenient and beneficial for such purposes, but was absolutely essential whenever it became necessary to use vehicles to convey the articles mentioned. The evidence is conclusive that the alley was the only means of ingress and egress to and from the back portion of the premises without going through the building.

The following sketch, made without reference to exact scale, illustrates, approximately, the various parcels of land referred to, the street, ditch, and bridge, and is self-explanatory:



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The evidence tends to show that the use made of the alley by respondents and their tenants since they moved there in 1914 has been much more extensive than that made by former occupants, and that no doubt intensified the trouble which finally resulted in the present litigation.

Appellant presents for our consideration a question which, as far as the writer is informed, has never before been determined by this court. The question is not only new in that sense, but, as we view the case, its proper determination is decisive of the main issue presented for our consideration. The question, in the last analysis, is: Can the owner in fee of a parcel of land convey a part thereof and reserve from the part conveyed a right of way for herself, heirs and assigns, over a strip contiguous to that retained by herself, unless the conveyance describes the land so retained by the grantor? Appellant contends with great earnestness and more than ordinary ability that such a reservation only reserves to the grantor a mere personal right which is neither inheritable nor assignable, notwithstanding words of inheritance and assignability are used, and notwithstanding the further fact that the grantor may have retained the ownership of contiguous lands which might be benefited by the right of way. In short, appellant contends that by the terms of the conveyance in this case, including the reservation, the common ancestor, Jane Elizabeth James, did not reserve an easement appurtenant to other lands owned by her which might be inherited or assigned, but only reserved a way in gross, which upon her death would become extinguished. This position of appellant gives no effect whatever to the words "heirs and assigns" occurring in the reservation in both conveyances, but construes the instruments as if these words had been omitted altogether. Many of the cases hereinafter cited support the contention of appellant that words of assignability or inheritance do not of themselves make the easement assignable or inheritable if in fact it is only an easement in gross.

Whether or not an easement in gross might be made assignable or inheritable merely by the use of words suggestive of these qualities need not be determined by us in the instant

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case. It is sufficient for our present purpose to determine whether the right of way in question here is an easement appurtenant or an easement in gross under the facts disclosed by the record and the law applicable thereto.

An "easement appurtenant," sometimes called an easement proper, has been defined as follows:

"An 'easement proper' is a privilege which the owner of one tenement has the right to enjoy, in respect to that tenement, in or over the tenement of another person." 3 Words and Phrases, p. 2306.

Again, the same authority, at page 2307, in speaking of the essential elements of an easement appurtenant, says: 1

"The existence of an easement involves the idea of two distinct tenements; a dominant estate, to which the right is accessorial; and a servient estate, upon which it is a burden or charge."

An "easement in gross" is defined by the same authority, at page 2311, as follows:

"An easement in gross is a mere personal interest in the real estate of another, and is not assignable or inheritable. It dies with the person, and it is so exclusively personal that the owner by right cannot take another person in company with him."

The principal distinction between the two classes of easements seems to be that in the easement appurtenant there must be a dominant tenement, while no such 2 element exists in an easement in gross.

These definitions have been selected, from a large number examined, because of their brevity and perspicuity. Applying them to the facts in the case at bar, we have no difficulty whatever in determining to which class the easement in question belongs. Here we have the right of way reserved by the common ancestor out of the lands conveyed to Eliza Shafer, appellant's predecessor in interest. At the time the common ancestor made this conveyance and reservation, she had and retained ownership of other lands abutting on the right of way which would be permanently benefited thereby. Indeed, the purpose of the reservation is so manifest, when we consider the surroundings, as to be self-evident and apparently incontrovertible. If the land conveyed by Jane Elizabeth James had been all the land she had and she had reserved therefrom a right of way, it might well be conceded

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the right would have been merely an easement in gross; there would have been no dominant tenement to which the right of way could have been appurtenant. But such we have seen was not the case. At the very time she made the conveyance and reserved the right of way, she owned other lands upon which she was residing—land contiguous to the right of way and dependent upon it as a means of ingress and egress to and from the back portion of her premises.

It seems to us that this matter is too plain for controversy. The right of way in question, viewed in the light of the surrounding circumstances, has all the earmarks of an easement appurtenant, and unless, as contended by appellant, it was necessary in the deed to describe the dominant tenement or land to which the right of way was appurtenant, the judgment should be affirmed as far as the right of way is concerned.

In support of her contention that the right of way in question is a mere easement in gross and not an easement appurtenant, and that a deed creating an easement appurtenant should describe the dominant estate, appellant calls our attention to the case of *Cadwalader v. Bailey*, a Rhode Island case, found in 17 R. I. 495, 23 Atl. 20; 14 L. R. A. at page 300. Appellant also cites and relies on all the cases referred to in the opinion of the court, to which we direct the attention of the reader. Appellant appears to rely with great assurance upon the doctrine enunciated in that case and the cases cited, for only one or two other cases are referred to in her brief. We cannot afford to review the case at length, but the controlling facts are that certain grantors owned the land conveyed and also other land known as "Bailey's Beach." The grantors conveyed the first-mentioned land to Cadwalader, with certain bathing rights on the beach, and also stipulated in the deed for themselves, their heirs, administrators, and assigns, that no building except bathing cars should ever be constructed on Bailey's Beach, etc. Cadwalader thereafter sold all of the land so conveyed to him, but undertook in the conveyance to reserve to himself, his heirs and assigns, the right pertaining to the building restriction to which reference

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has been made. A descendant and residuary legatee of Cadwalader brought the action to enforce the restriction. The court, in concluding the opinion, says:

"It follows, then, that the complainant, never having owned the dominant estate described in the bill, has no standing in a court of equity to enforce rights which were appurtenant thereto."

Thus, we see, the first Cadwalader, having sold the dominant estate, could not retain the naked right to enforce the building restriction. At most, it was only an easement in gross which at his death became extinguished. This is an authority directly in point on the proposition heretofore suggested that if Jane Elizabeth James, the common ancestor, when she made the conveyance referred to, had conveyed away all her land, the reservation of a right of way would have been merely an easement in gross. So far from this case being an authority for appellant in her present contention, it seems to us it tends to support the position of respondent. The clear inference is that, if the first Cadwalader had not disposed of the land intended to be benefited by the restriction, the court would have sustained the action brought by his devisee.

However, while that particular case, for the reasons stated, seems to be against appellant's contention, it must be conceded that one of the cases cited in the opinion is exactly in point to the proposition that, unless the dominant estate is described in a deed of conveyance, any easement attempted to be created is only an easement in gross. *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354, is the only case called to our attention, and the only one we have been able to find, that holds to that effect. The first four paragraphs of the syllabi reflect the opinion of the court:

"When the owner of a tract of land sells one-half of it, reserving a right of way across it, and in the same deed grants to the vendee a right of way across the unsold half, these rights are not annexed to, or appurtenant to, the respective tracts, and do not pass with the title. Whether the grant of a right of way be in gross, or appurtenant to some other estate, must be determined from the grant itself, and not by matters aliunde.

"The principal distinction between an easement and a right of

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way in gross is that in the first there is, and in the second there is not, a dominant tenement.

"The grant of an easement is always made for the benefit of other premises, which are described in the grant.

"A right of way is an interest in lands, to be conveyed only by an instrument in writing, which must describe the interest conveyed. If it is appurtenant to another tract, it must be so described, together with the tract of land to which it is appurtenant."

The opinion is by a divided court, and is otherwise inherently weak and unsatisfactory.

The overwhelming weight of judicial opinion, as we read the cases, is to the effect that an instrument attempting to create an easement should be read in the light of 3 surrounding circumstances and the situation of the parties and property involved, especially where the language used is ambiguous and apparently contradictory.

In *Peck v. Conway*, 119 Mass. 546, in which the deed created an easement, it does not appear that the dominant estate was described in the deed. The doctrine of the opinion is clearly reflected in the syllabi, the first paragraph of which is as follows:

"A reservation in a deed of land, that no building is to be erected by the grantee, his heirs or assigns, upon the land conveyed, creates an easement, or a servitude in the nature of an easement, upon the land; and the situation of the land relatively to other land of the grantor may be considered in determining whether such easement or servitude is a personal right of the grantor or is appurtenant to his other land."

In *Dennis v. Wilson*, 107 Mass. 591, the same condition exists. It is not apparent that the deed described the dominant estate. Notwithstanding this, an easement appurtenant was sustained. The following paragraph from the court's opinion, on page 592 of 107 Mass. is in point:

"In this case, Jenkins conveyed to Rice part of his entire tract of land. The right of way, excepted and reserved, extended from the highway in front, along the line of division, for a specified distance, less than the whole depth of the lots. As the grantor could have no occasion, apparently, to use such a way for any other purpose than for access to and egress from his remaining land, the inference would seem to be inevitable that it was for that use that both parties must have understood and intended the way to be held."



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See, also, *Badger v. Boardman*, 16 Gray (Mass.) 560, in which the court held that no easement was created. We cite the case, however, to the point that, in attempting to determine the meaning of an instrument purporting to reserve an easement, the circumstances surrounding the parties, their situation when the deed is made, and the situation of the property with reference to other lands of the grantor, may be considered.

In *Winston v. Johnson*, 42 Minn. 398, 45 N. W. 958, a right of way was involved. We quote the fourth paragraph of the syllabi, which, so far as the point in review is concerned, states the essence of the opinion:

"Where there is in the deed no declaration of the intention of the parties in regard to the nature of the way, it will be determined by its relation to other estates of the grantor, or its want of such relation. Resort may also be had in such a case to other circumstances surrounding the transaction, for the purpose of ascertaining the intent and the effect to be given the instrument."

In *French v. Williams*, 82 Va. 462, 4 S. E. 591, we have a case from which we feel impelled to quote at considerable length. Before doing so, however, we refer for a brief moment to the deed of Jane Elizabeth James, under which both the parties to this controversy claim, and the language therein "her heirs and assigns." Appellant contends that these words are meaningless and without effect. On the other hand, it must be admitted that the words, both in their technical and ordinary meaning, imply something more than a mere easement in gross as heretofore defined. If, then, because of some technical rule of law, as contended by appellant, these words have lost both their technical and ordinary meaning, it is our duty, if possible, to find for what purpose the words were used. If the purpose does not fully appear in the instrument itself, then there arises an ambiguity which may be explained by the surrounding circumstances, the situation of the parties, and the property involved. The case last referred to is also concerning a right of way. The following excerpt from the opinion, on pages 468 and 469 of 82 Va., on page 594 of 82 Va., is self-explanatory:

"Nor is it specifically stated in the deed that F. T. Moreland

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owned the entire tract, or that he retained the part not sold to French. In fact, the failure of the deed to specify that Moreland owned or retained any land to which the 'way' reserved could be appurtenant is strongly urged to uphold the contention that the way reserved was of a right in gross and not of a right appurtenant.

"Hence, the absolute necessity, if the substance, and not the shadowy form, of the contract is to be looked to, of resorting to extrinsic evidence to ascertain the true intent and meaning of the parties, by having recourse to the circumstances which surrounded them at the time, and in the light of which they executed the contract. This is all the more important in view of the rule that a way is never presumed to be in gross when it can fairly be construed to be appurtenant to land. Wash. E. and S. 232. And in view of the further rule 'that parties are presumed to contract in reference to the condition of the property at the time of the sale.' Wash. E. and S. 79. And these principles are all the more applicable inasmuch as the way here is reserved to 'Moreland, *his heirs and assigns*,' language which strongly tends to preclude the idea of a reservation in gross. Moreover, the way reserved is 'as now and heretofore used,' but the deed, whilst it further designates it as 'from the east back street of said town, leading by the old stone house, to the back mill road,' yet fails to describe the character of way referred to, or whether it was entirely or only in part, over the land conveyed to French.

"It is essential to understand all these things in order to uphold and enforce the contract according to its true meaning; and to understand them resort must be had to the real state of facts and circumstances surrounding the parties when they entered into the contract. It is clear, therefore, that parol evidence is admissible to explain the surroundings, and to enable the court to place itself in the same situation occupied by the parties who made the contract, and thus, in view of all the attendant circumstances, to judge of the meaning of the words used, and of the proper application of the language to the way which, to say the least is, in some measure, ambiguously described."

One further suggestion to make our meaning clear in respect to the use of the words "heirs and assigns" or similar words, and the effect that should be given to them in instruments of this kind: If such words are used in making a reservation in cases where the grantor in fact retains no land that can be benefited by the easement, then the use of such words cannot have the effect of creating an easement appurtenant, for the element of a dominant estate

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is lacking. In such case it is only an easement in gross. If, on the other hand, the words "heirs and assigns," or similar words, are used in a deed reserving an easement, and the deed refers to no land of the grantor to which said easement can be appurtenant, but such land in fact exists, or existed when the reservation was made, the fact of the existence of such land may be established in order to give effect to the words used in making the reservation.

We also call attention to the following cases, more or less to the same effect as those already considered: *Clark v. Martin*, 49 Pa. at page 297; *McMahon v. Williams*, 79 Ala. at page 288.

It would serve no useful purpose to multiply cases in support of the doctrine enunciated in the opinions above referred to. We have examined and carefully read 5 many times the number of cases above cited, and are satisfied that the selections made reflect the great weight of judicial opinion. It would be a harsh rule indeed that would deprive respondents in this case of an appurtenance almost indispensable to a comfortable enjoyment of their property—an appurtenance enjoyed by them and their predecessors in interest, under a substantial claim of right, for more than a quarter of a century. We refer specifically to the right of ingress and egress to and from their property for the benefit of which the easement was created. Respondents, however, can claim no greater right than that reserved in the deed of their ancestor, Jane Elizabeth James. The right to fry fat or to permit their horses to stand in the alley except while loading and unloading vehicles, or to make any kind of filth therein, is not permissible under the terms of the reservation creating the right of way; and even for the purpose of loading and unloading vehicles only such length of time should be permitted as is reasonably necessary for the purpose. The decree should be modified in these respects. The conclusion reached is decisive of all the questions involved.

The case is therefore remanded to the trial court, with directions to modify the decree in accordance with the views herein expressed, and the judgment so modified may be, and

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is hereby, affirmed. The parties to pay their own costs on appeal.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

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CLARK et al. v. LUND.

No. 3376. Decided November 25, 1919. (184 Pac. 821.)

1. **LIMITATION OF ACTIONS—CONTRACTS TO SHORTEN PERIOD VALID.** Parties to a contract may stipulate for a period of limitations shorter than that fixed by the statute of limitations. (Page 286.)
2. **SALES—RELEASE FROM FURTHER LIABILITY NOT COVENANT TO REFRAIN FROM SUIT.** A clause in a "guaranty contract," in which a seller represented and warranted a stallion, "this contract expires, and the seller is hereby released from any further obligations to the purchaser after April 1, 1915," was not a covenant or agreement not to sue on the contract after April 1, 1915. (Page 286.)
3. **SALES—RELEASE CONSTRUED.** A clause in a "guaranty contract," in which a seller warranted a stallion to be serviceably sound, "this contract expires, and the seller is hereby released from any further obligations to the purchasers after April 1, 1915," had the effect of releasing the seller from any duties or defaults occurring after April 1, 1915, but did not prevent the purchasers from suing for defaults occurring prior to such date. (Page 287.)
4. **LIMITATION OF ACTIONS.—SIX-YEAR STATUTE APPLICABLE TO BREACH OF WARRANTIES IN SALE.** An action held based on an alleged breach of contract of warranty and governed by the six-year statute of limitations, and not Comp. Laws 1917, section 6468, prescribing three years as the period for the commencement of action for relief on the ground of fraud; although it was alleged in the complaint that representations and warranties in the agreement were false and untrue. (Page 287.)

Appeal from District Court of Utah County, Fourth District; *A. B. Morgan*, Judge.

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Appeal from Fourth District.

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Action by E. W. Clark and others against L. W. Lund.  
From judgment of dismissal, plaintiffs appeal.

REVERSED.

*Parker & Robinson*, of Provo, for appellants.

*Edward McGurrin* and *W. E. Rydalch*, both of Salt Lake City, for respondent.

WEBER, J.

The amended complaint filed by plaintiffs is, in substance, that on December 17, 1913, plaintiffs purchased a stallion from defendant for the sum of \$2,600, and that the parties at that time entered into a contract denominated a "guaranty contract," in which the defendant represented and warranted the stallion to be serviceably sound. The contract, which is set out in the complaint, contains, among others, this provision:

"This contract expires, and the seller is hereby released from any further obligations to the purchasers after April 1, 1915."

It is further alleged that the representations and warranties in the agreement were false and untrue, and that said stallion, at the time of sale was afflicted with chronic inflammation of the liver, and that because of such disease he died on or about May 13, 1914. Plaintiffs further allege that they duly performed all conditions precedent on their part to be performed under the terms of the agreement, and that the said stallion, if as represented and warranted by the defendant, would be of the value of \$2,600, but, if not as represented and warranted, would be of no value whatever.

To the amended complaint defendant demurred on these grounds:

"(1) That said amended complaint does not state facts sufficient to constitute a cause of action.

"(2) That said alleged cause of action set forth in said amended complaint is barred by the provisions of subdivision 4 of section 2877 of the Compiled Laws of Utah of 1907, and also is barred by

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the provisions of subdivision 4 of section 6468 of the Compiled Laws of the State of Utah of 1917.

"(3) That on its face said amended complaint shows that the alleged cause of action set forth therein is barred by the provisions of subdivision 4 of section 2877 of the Compiled Laws of the State of Utah of 1907, and also is barred by the provisions of subdivision 4 of section 6468 of the Compiled Laws of the State of Utah of 1917.

"(4) That upon its face said amended complaint shows that the alleged cause of action therein set forth is null, void, expired and fully released, and of no further effect or binding after the 1st day of April, 1915, and that it is also barred by the provisions of subdivision 4 of section 2877 of the Compiled Laws of the State of Utah of 1907, and is also barred by the provisions of subdivision 4 of section 6468 of the Compiled Laws of the State of Utah of 1917."

The demurrer was sustained by the court. Plaintiffs electing to stand on the complaint, the cause of action was dismissed. From the judgment of dismissal plaintiffs appeal.

The respondent contends here, as he did in the trial court, that the sentence, "This contract expires, and the seller is hereby released from further obligations to the purchasers after April 1, 1915," is, first, a covenant, not to sue, and, second, a complete release and extinguishment of the contract.

In support of the first contention, it is argued that parties to a contract may stipulate for a period of limitations shorter than that fixed by the statute of limitations, 1, 2 and authorities are cited supporting that well-established proposition. It is further said by respondent's counsel that courts sometimes construe a release as a contract not to sue. We also agree with the latter assertion. From these premises counsel draw the conclusion that the sentence above quoted from the contract is a covenant not to sue—that plaintiffs covenanted and agreed not to bring any suit on the contract after April 1, 1915. Such a conclusion does not, and cannot, follow in this case, unless the plain language and meaning of the contract be distorted out of all semblance of reason. If the seller is liable for any breaches of the warranties contained in the contract occurring before April 1, 1915, the purchasers may bring suit at any time within the statutes of limitations, but they cannot recover on breach of

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warranty occurring after April 1, 1915, is clearly the meaning of the paragraph in question.

The other proposition advanced by defendant is also without merit. "This contract expires, and the seller is hereby released from any further obligations to the 3 purchasers after April 1, 1915," means what it says: and that is, that the defendant is released and discharged from all obligations, duties, and defaults occurring after April 1, 1915, and it is logically and necessarily implied that he is liable for breaches of contract before the date named and that he is released from none of those. The words "after April 1, 1915," limit the obligations to that date, and nothing that may happen after or beyond the date specified shall create any obligation or liability on the part of the seller.

A similar provision of a contract was construed in *Board of Education v. Wright-Osborne Co. et al.*, 49 Utah, 468, 164 Pac. 1038. Referring to a provision in a contract that a bond should "expire two years from the date of contract," it is said by Mr. Justice FRICK:

"The meaning as well as the apparent intention of the provision clearly is that the obligation in the bond shall not cover any defaults of the contractor under his contract which occur after the expiration of two years."

In that case, as in this, suit was brought on the bond after its termination and based on defaults occurring before its expiration. If we entertained any doubt as to the meaning and effect of the contract set out in plaintiffs' complaint, we would still be inclined to hold the case above referred to as applicable to and decisive of the propositions presented in respondent's brief.

This suit being based on an alleged breach of contract occurring in 1914, and having been commenced within 4 six years after the alleged cause of action accrued, the statute of limitations (Comp. Laws Utah 1917, section 6468) prescribing three years as the period for the commencement of action for relief on the ground of fraud cannot be successfully invoked by defendant.

We are of the opinion that the court erred in sustaining the

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demurrer interposed by defendant to the amended complaint.

The judgment dismissing the action is therefore reversed, with costs to appellant.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

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POOL v. MOTTER et al.

No. 3393. Decided November 25, 1919. (185 Pac. 714.)

1. **VENDOR AND PURCHASER—RESCISSION FOR DEFAULT OF VENDORS RELIEVES PURCHASER FROM FUTURE PAYMENTS.** Where defendants, vendors, agreed to make, when due, a payment to become due the United States on the land sold, and defaulted therein, and secured an extension of time for such payment, and demanded that plaintiff purchaser pay the same, plaintiff could then rescind and demand return of his money paid, and he was not required to pay vendors a sum subsequently becoming due under the purchase contract.<sup>1</sup> (Page 291.)
2. **CONTRACTS—RESCISSION FOR BREACH RELIEVING INJURED PARTY FROM FURTHER PERFORMANCE.** Where a contract is entire, and remains executory in whole or in part, and one party commits a breach of his duty, and the other is not in default, the latter may rescind and be relieved from further performance. (Page 291.)

Appeal from District Court, Fourth District, Duchesne County; *A. B. Morgan*, Judge.

Suit by Hyrum H. Pool against Fred Motter and another.

From a judgment for plaintiff, awarding him costs only, and dismissing the complaint and cross-complaint, the plaintiff appeals.

**JUDGMENT MODIFIED and AFFIRMED.**

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<sup>1</sup> *Obrecht v. Neilson Land & Water Co.*, 44 Utah, 270, 140 Pac. 117.



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Appeal from Fourth District.

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*C. J. Wahlquist*, of Myton, for appellant.

*Thomas W. O'Donnell*, of Vernal, for respondents.

WEBER, J.

Plaintiff appeals from a judgment in his favor, awarding him costs only, and claims he should recover \$500 and interest. The facts found by the court are as follows:

"(1) That at the time alleged in the complaint the defendants, Fred Motter and B. L. Dart, were associated together in the business of real estate brokers under the firm name of the Pioneer Realty Company, with an office at Myton, Utah.

"(2) That on or about the 13th day of May, 1918, at Myton, Utah, the defendants agreed with plaintiff that in consideration of the sum of \$1,200 they would sell to plaintiff, free from any incumbrance and with a clear, marketable title thereto, a certain tract of land situated in Duchesne county, state of Utah, and described as the southwest quarter of the northwest quarter of section 34, township 3 south, range 2 west, Uintah special meridian.

"(3) That a contract was prepared by defendants, consisting of a printed form, with blanks filled in with pen and ink, purporting to set out the terms of the sale, and signed by the plaintiff and by Fred Motter for the Pioneer Realty Company. That said contract provided that plaintiff should pay defendants the sum of \$500 cash down, and the remainder in partial payments—the sum of ninety dollars every ninety days thereafter until the purchase price was paid in full—without any interest on said deferred payments, and that defendants were to deliver to plaintiff an abstract of title showing a clear, marketable title 'within thirty days after the consummation of the sale.'

"(4) That pursuant to said agreement the plaintiff paid to defendants the sum of \$500 in money on May 13, 1918, taking a receipt therefor.

"(5) That it was explained to plaintiff that the land was so-called Indian land, purchased from the United States on the deferred payment plan, and that it had not at the time of the deal been wholly paid for. That there were certain amounts to be paid annually, bearing interest at the rate of six per cent. per annum, and that United States patent would not issue until all such deferred payments had been made.

"(6) That the defendants assumed and guaranteed the making of all such payments, or any other payments due to the prior holder, as such payments were to become due.

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"(7) That defendants failed and neglected to make a payment on said land that became due to the United States about June 22, 1918, in the sum of \$200.

"(8) That about July 29, 1918, the defendant B. L. Dart made a demand on plaintiff that he (plaintiff) pay the \$200, with interest, then due the United States on said tract of land, and that said demand was thereafter repeated at least on two different occasions.

"(9) That the plaintiff treated the failure of defendants to make the payment of \$200 at the time it was due to the United States, and the subsequent demand on him to pay it, as a breach of the covenant of title in the contract on the part of defendants, and refused to make the payment of \$90 due August 10, 1918, under the contract of sale, and refused to make any further payments, sought to rescind the contract, and demanded the return of the \$500 paid on May 13th.

"(10) That the defendants treated the failure and refusal of plaintiff to pay the ninety dollars due under the contract on August 10, 1918, and his refusal to pay the \$200 (with interest) due the United States as a breach of the contract on the part of plaintiff, and seek to have the contract canceled, and the \$500 paid on said land declared forfeited as liquidated damages.

"(11) That the \$200 due the United States on said land in June, 1918, was not paid at the time the cause was heard, but that without consulting plaintiff the defendants made arrangements with the United States officials for an extension of time for making such payment."

From the foregoing findings of fact the court found as one of its conclusions of law that, as plaintiff had not made a tender of money due under his contract, he could not rescind the contract, and was not entitled to the return of the money paid by him under it.

Upon these findings and conclusions judgment was rendered, dismissing plaintiff's complaint and the cross-complaint of defendants, and awarding plaintiff his costs against defendants.

The only question here involved is whether, after breach of contract by defendants, it was necessary for plaintiff to make a tender of performance before he was entitled to rescind the contract and demand a return of the money paid by him on the contract. A payment of \$200 was due the government on June 22, 1918, and this payment defendants had assumed and guaranteed to make when due. On July 29, 1918, defendants

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demanding that plaintiff pay this \$200, which defendants, in violation of their contract, had neglected to pay. Plaintiff thereupon treated the failure of defendants to make the payment to the government when due as a breach of the contract, demanded a return of the \$500 paid defendants, and thereafter refused to make the payment of ninety dollars due August 10, 1918. The payment of the \$200 by the defendants when due was a material, important, and essential element of the contract.

The fact that some sort of an arrangement was made by defendants with some United States officials for an extension of time for making such payment is no justification for the course pursued by defendants, who not only committed a breach of an essential and vital portion of their contract—a breach destructive of the very purpose of the contract—but with amazing assurance repeatedly demanded that plaintiff pay the \$200 which they should have paid. In addition to a breach of the contract, the course of action by defendants amounted to a renunciation by them. Plaintiff certainly had a right to rescind the contract and demand the repayment of the \$500. But it is contended that plaintiff should in any event have made the ninety dollar payment on August 10, 1918. To have made such payment would have been to “pay today so that he may sue to-morrow to recover it back.” It would have been an idle formality. Plaintiff had a right to rescind the contract upon its breach by defendants, and no further tender was required of him. *Obrecht v. Neilson Land & Water Co. et al.*, 44 Utah, 270, 140 Pac. 117.

The facts found by the court bring this case squarely within the general rule that—

“If a contract is entire, and remains executory in whole or in part, and one party fails to perform what it is his duty to do under the contract, and the other party is not in default, the latter may rescind the contract.” Black on Rescission and Cancellation, section 196.

After defendants had violated a material and essential obligation by them to be performed under the contract, which was not severable, the plaintiff was not required

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to tender any money that became due after such breach, and he was at liberty to treat the contract as rescinded, and was entitled to a return of the money paid by him on the contract.

The district court is therefore directed to modify the conclusions of law and the judgment in conformity with the views herein expressed, and to render judgment in favor of plaintiff and against defendants in the sum of \$500, with legal interest thereon from May 13, 1918. Save as herein modified, the judgment is affirmed, with costs to plaintiff.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

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#### NEW YORK PLATE GLASS INS. CO. v. MARTINES.

No. 3359. Decided November 26, 1919. (184 Pac. 819.)

1. **MASTER AND SERVANT—EVIDENCE SHOWING INJURY TO THIRD PERSON BY SERVANT'S NEGLIGENCE IN HIS EMPLOYMENT.** In an action by a plate glass insurer to recover from a garage keeper damages to the front of a hotel caused by backing an auto bus from the garage into it, evidence held to sustain finding that defendant, "by his servants and employes acting within the scope of employment, committed the injuries complained of. (Page 296.)
2. **MASTER AND SERVANT—OWNERSHIP OF AUTOMOBILE DOES NOT ESTABLISH LIABILITY.** The mere fact of ownership of an automobile will not establish liability of the owner for injuries resulting from negligent operation by one to whom the owner has lent the car, something more than ownership being required to establish agency or the relation of master and servant between the owner and a borrower or negligent operator.<sup>1</sup> (Page 297.)
3. **APPEAL AND ERROR—HARMLESS ERROR IN EXCLUSION OF DOCUMENTARY EVIDENCE OTHERWISE DEVELOPED.** In a plate glass insurer's action against a garage keeper for damages through the negligence of the keeper's employe in backing an auto bus into

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<sup>1</sup> *McFarlane v. Winters*, 47 Utah, 598, 155 Pac. 437, L. R. A. 1916D, 618.

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Appeal from Sixth District.

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a hotel front, exclusion from evidence of a book of accounts between defendant garage keeper and a third person, who drove the bus on a percentage basis, *held* harmless to defendant, who testified at great length and without contradiction as to his business and settlements with the bus operator. (Page 297.)

Appeal from District Court of Sevier County, Sixth District; *H. N. Hayes*, Judge.

Action by the New York Plate Glass Insurance Company, a corporation, against *F. G. Martines*.

Judgment for plaintiff, and defendant appeals.

**AFFIRMED.**

*Bean & Hunt*, of Richfield, for appellant.

*E. E. Hoffman* and *J. H. Erickson*, both of Richfield, for respondent.

CORFMAN, C. J.

This was an action brought by plaintiff to recover damages by reason of the negligent operation of an automobile.

It is in substance alleged in the complaint that, at the time of the negligence complained of, defendant was engaged in the business of buying and selling, repairing and storing, operating and hiring out, automobiles, and running a garage and automobile livery at Richfield, Utah; that while engaged in the business aforesaid defendant's agents and employes negligently and carelessly backed an auto bus from defendant's garage, across a street, and against a hotel building owned by one *Mrs. Diana C. Johnston* and insured by the plaintiff, thereby breaking the plate glass front and damaging the said building to the amount sued for in the action. It is further alleged that the plaintiff's claim for damages against the defendant was paid by it, as insurer, to the said *Diana C.*

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Johnston, and her right of action against the defendant is duly assigned to the plaintiff.

The answer admits that during the times stated in the complaint defendant was engaged in maintaining a garage at Richfield, Utah, and engaged in buying, selling, storing, and repairing automobiles, and denies generally the other allegations of the complaint.

The trial was to the court without a jury. Judgment was rendered in plaintiff's favor as prayed for in its complaint. Motion for a new trial was made and denied. Defendant appeals.

The errors complained of on appeal go to the admission of certain testimony over defendant's objection, denial of motion for a nonsuit, the insufficiency of the testimony to support the trial court's findings, and the denial of defendant's motion for a new trial.

The facts disclosed by the testimony show that the defendant was, on the date of the accident, May 3, 1917, the owner of an auto bus and hack. There is testimony tending to show that the bus was being operated under a verbal lease from the defendant by one Joseph Ireland, who collected the fares from the traveling public and paid to the defendant fifteen per centum of the net proceeds thus realized in the operation of the bus, under the name of Richfield Auto Service. When not in use upon the roads, the bus was kept without charge at the garage of the defendant. On the evening of the day in question, the garage was left in the sole charge of one Kenneth Hood, an employé of the defendant. Ireland had been engaged to take a party from the Johnston Hotel, just across the street from the garage, to Monroe Hot Springs, and had arranged with Hood to drive the bus over to the hotel while he (Ireland) was preparing for the intended trip. Hood negligently backed the bus from the defendant's garage across the street, over the curbing and into the hotel, thereby causing the damages complained of to the hotel building. The hotel building was at the time insured against accident by the plaintiff, and, under the terms of the policy and an assignment made, the plaintiff was subrogated

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to the rights of the owner of the hotel in the action brought for damages against the defendant.

The defendant testified that the duties of his employé, Hood, were those of a night watchman, to let cars in the garage for storage, direct their storage, move cars when necessary to do so, collect storage fees, and that he had the general care and management of the garage business from 7 o'clock in the evening until 8 o'clock in the morning. The testimony of the defendant further tends to show that Hood was inexperienced in the operation of motor cars on their own power, and that the defendant had instructed Hood that his duties were to be confined to doing the work within the garage and that he should not attempt to move the cars left there or about the building except by hand.

William Johnston, a witness for the plaintiff, testified that he was at the time of the accident the proprietor of the hotel, and that he and his wife, the owner, were at the time engaged in running it; that both before and after the accident the defendant had, in conversations with him, admitted that Hood and Ireland were in his employ, and that he had seen them both working in and about the defendant's garage; that after the accident the defendant had acknowledged to the witness that they were working for him and that he would hold out their wages to pay to the hotel the damages occasioned by the accident; that subsequently the defendant advised him that Hood and Ireland had quit working for him and that he was in nowise responsible for the damages. The defendant denied that Ireland was in his employ at the time of the accident, or that he had admitted to the witness Johnston that Ireland was working for him at the time. He further testified that Ireland was operating the bus under lease as before stated.

The trial court found:

"That on or about May 3, 1917, defendant, while engaged in the business of running the said garage, \* \* \* and by his agents, employes, and servants, to wit, one Kenneth Hood, did carelessly, negligently, and wrongfully back the said auto bus into and upon the front of the said building," etc.

The defendant contends that under the testimony Hood was not acting within the scope of his employment with the de-

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fendant, but solely as the agent and servant of Ireland, and that as a matter of law he should not be held to answer for the damages sued for by plaintiff. In support of this contention, counsel have cited us to *Sherwood v. Warner*, 27 App. D. C. 64, 4 L. R. A. (N. S.) 651, 7 Ann. Cas. 98. In that case the plaintiff was a mechanic in the employ of an elevator and machine company that had sent plaintiff with certain helpers to repair a damaged elevator (not in use) for the defendant. While working upon the elevator, the plaintiff's arm became caught between a wheel and the elevator ropes. The plaintiff, through his helpers, called the defendant's house janitor—who was not employed to repair, nor assisting in the repairing, nor engaged in operating, the elevator—to aid in extracting the plaintiff. The janitor responded to the request made by the plaintiff and lowered the elevator instead of raising it, thereby severely injuring the plaintiff, by reason of which he sought to recover damages against the defendant. It was held as matter of law that under the circumstances the janitor acted as the agent of the plaintiff, and not in the general course of his employment as the defendant's servant. The court, in passing upon the question there involved, enunciated the well-recognized doctrine that—

“To make a master liable for an injury caused by his servant's negligence, the servant must have done the act causing the injury in the service of the master, and in doing an act which the master is bound to perform or which is done by his direction.”

While the doctrine as applied to the facts in that case is based, as we believe, on sound legal principles, and supports the contention and theory of the defendant here, 1 it must be kept in mind that there is testimony in the record before us tending to show that the defendant admitted after the accident, as well as before, that both Hood and Ireland were working for him at the time of the accident. These admissions on the part of the defendant, as testified to by the witness Johnston, when taken in connection with the further facts, admittedly true, that when the accident occurred Hood was in the general employ of the defendant, having sole charge of defendant's garage where auto cars were being constantly stored and handled, that Ireland who was driving the



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auto bus in question kept and cared for it, when not running, at defendant's garage and made his headquarters there, affords some substantial testimony, at least, on which to base the finding of the trial court that "the defendant by his servants and employes" committed the injuries to property, as complained of by plaintiff.

While it is true, as was held by this court in *McFarlane v. Winters*, 47 Utah, 598, 155 Pac. 437, L. R. A. 1916D, 618, the mere fact of ownership of an automobile will not establish a liability of the owner for injuries resultant 2 from the misuse or negligent operation by one to whom the owner has loaned it, and something more than ownership is required to establish agency or the relation of master and servant between the owner and the borrower, or the negligent operator, yet, in view of the testimony here as to the admissions of the defendant, and the facts and circumstances disclosed by the record, we are not prepared to say that the trial court's finding as to defendant's liability was not a proper one.

In support of defendant's theory that the auto bus in question, while owned by the defendant, was being operated under a lease from the defendant to Ireland at the time of the accident and that the defendant had no control over it, defendant offered to introduce in evidence, over the objection of the plaintiff, a book purporting to be the accounts kept by Ireland while he was driving the auto bus, and to further show that settlements were made between Ireland and the defendant for the use of the bus upon a percentage basis, and also to show that Ireland was not in defendant's employ at the time of the accident. The trial court's refusal to admit the book is assigned as error.

The authenticity of the book was not attempted to be shown, except the defendant testified that he was acquainted with, and that the entries were in, the handwriting of 3 the garage bookkeeper. Moreover, the defendant was permitted to testify at great length, and without contradiction, as to how he had transacted business and made his settlements with Ireland. The record stands uncontradicted that Ireland was operating the bus on a percentage basis and

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that settlements were made in accordance with the book kept by the garage bookkeeper. From any viewpoint we cannot perceive how the exclusion of the exhibit offered was prejudicial to the defendant.

As we view the record, the findings of the trial court, as pointed out, are sustained by the evidence, and we find no prejudicial error assigned that would warrant us in reversing the judgment. It is therefore ordered that the judgment of the district court be affirmed. Costs to the respondent.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

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FOXLEY v. GALLAGHER et al.

No. 3396. Decided December 1, 1919. (185 Pac. 775.)

1. **APPEAL AND ERROR—EXCLUSION OF EVIDENCE HARMLESS ERROR.** Where every legitimate purpose for which a former question to which objection was sustained could have been asked was fully covered by the answer of the same witness to a subsequent question, any error in sustaining objection to the first question was harmless. (Page 301.)
2. **HIGHWAYS—PASSENGERS IN AUTOMOBILE NOT LIABLE FOR COLLISION.** Passengers in an automobile with the owner thereof are not liable for injuries to a motorcycle rider collided with, unless they were engaged in a joint enterprise with the owner of the car, or on their own part were negligent. (Page 301.)
3. **NEW TRIAL—VERDICT MAY BE SET ASIDE BY COURT ON OWN MOTION.** Under Comp. Laws Utah 1917, section 6983, in an action against several defendants, where the court considered the evidence against some of the defendants insufficient to sustain verdict against them, it should have set the verdict aside of its own motion. (Page 302.)
4. **APPEAL AND ERROR—COURT DOES NOT ERR IN FAILING TO SET ASIDE VERDICT ON OWN MOTION.** Where certain defendants, neither of themselves nor by their counsel, requested or moved the trial court to set aside the verdict as against them as unsupported by evidence, the assignment that the court erred in failing to act on its own motion cannot be sustained except perhaps in a very extreme case. (Page 303.)
5. **APPEAL AND ERROR—MOTION FOR NEW TRIAL EQUIVALENT ON**

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APPEAL TO REQUEST FOR DIRECTED VERDICT. Motion of several defendants for new trial on account of insufficiency of the evidence to justify verdict against them was equivalent to request for a directed verdict, and should have the same effect on appeal, though the motion was submitted without argument, and disposed of without specification of the particulars in which the evidence was claimed to be sufficient. (Page 303.)

6. APPEAL AND ERROR—INSUFFICIENCY OF EVIDENCE WAIVED BY FAILURE TO MOVE FOR VERDICT AND NEW TRIAL. If after failing to move for directed verdict defendants had also failed to move for a new trial for insufficiency of evidence to sustain verdict against them, the question of the insufficiency of the evidence would not have been waived on appeal.<sup>1</sup> (Page 304.)

Appeal from District Court, First District, Box Elder County; *J. D. Call*, Judge.

Action by James H. Foxley, by his guardian ad litem, against F. H. Gallagher and others. Judgment for plaintiff, and defendants appeal.

REVERSED and cause remanded for new trial.

*Joe W. Rozzelle*, of Salt Lake City, for appellants.

*W. J. Lowe* and *Charles E. Foxley*, both of Brigham, for respondent.

THURMAN, J.

The plaintiff, James H. Foxley, a minor, while traveling on a motorcycle in a northerly direction, October 27, 1918, on a public highway in Box Elder county, Utah, came in collision with an automobile driven in the opposite direction by F. H. Gallagher, one of the defendants. The plaintiff received serious personal injuries in the collision, and his motorcycle was likewise considerably damaged.

Plaintiff, by his guardian ad litem, James G. Foxley, brought this action to recover damages for the injury so sus-

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<sup>1</sup> *Law v. Smith*, 34 Utah, 395, 98 Pac. 300.

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tained. A jury found the issues in favor of plaintiff, and judgment was entered thereon. All of the defendants appealed from the judgment, but the appeal of the defendant F. H. Gallagher was abandoned. Two errors are relied on for a reversal of the judgment: (1) The exclusion of certain evidence offered by defendants; and (2) the insufficiency of the evidence to justify the verdict.

The automobile was owned and driven by the defendant F. H. Gallagher; the other defendants were his wife and friends. The business upon which they were traveling appears to have been a Sunday excursion for pleasure, from Salt Lake City to Logan and return. It is claimed by respondent that appellants were engaged in a joint enterprise with the driver, F. H. Gallagher, whose negligence caused the collision, and that appellants are therefore jointly liable for the injury. On the other hand, appellants contend they were merely invitees of Gallagher, had no control whatever over his conduct and management of the machine, and were in no manner responsible for the injury. The only evidence relied on by respondent in support of his contention as to a joint enterprise is the testimony of one of the appellants, Jerry Toomey, who testified in substance that he had been invited by the Gallaghers to take this trip. He said he thought he would be permitted to pay his share of the expenses. He had no understanding with Gallagher to that effect, but was told by defendant Schaaf "it was to be fifty-fifty." He paid his portion of the gasoline expense to defendant Schaaf, who settled with Gallagher. This phase of the case will be referred to later.

During the trial of the case one Charles Whitworth was sworn as a witness for defendants. He was conducting a garage business at Brigham City, was called by defendant F. H. Gallagher to visit the place where the collision occurred on the evening of the accident. It was dark when he arrived there and was raining very hard. After describing his efforts to remove the automobile from the road and his experience as a garage man, he was asked in substance to state, in view of all he saw and did concerning the automobile, and in

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view of his experience as a garage man, whether, the 1  
automobile was on the east or west side of the road at  
the time of the collision. The question was objected to by  
respondent and objection sustained. The question appears to  
be somewhat involved. It asks not only as to what the witness  
saw and did respecting the automobile in order to reach a con-  
clusion as to its position at the time of the collision, but also  
includes as a factor his experience as a garage man. How-  
ever, this assignment of error is without merit for the reason  
that the witness was asked on redirect if he had made any  
examination for the purpose of determining the position of  
the automobile, as to whether it was on the east or west side  
of the road when the collision occurred, and he answered he  
did not. Every legitimate purpose for which the former ques-  
tion could have been asked was fully covered by the answer  
of the witness.

On the question of the insufficiency of the evidence to sus-  
tain the verdict appellants contend that as against  
them there was no evidence whatever as to their negli- 2  
gence or responsibility for the accident; that they were  
merely invitees of defendant F. H. Gallagher, who owned and  
drove the automobile, and, as before stated, had nothing what-  
ever to do with his control and management of the machine.  
Under these circumstances they insist that the evidence  
against them is wholly insufficient to support the judgment.  
In our opinion this contention of appellants is unassailable.  
There is no evidence whatever of their participation in a  
joint enterprise in a legal sense so as to render them liable,  
nor is there evidence of any act or omission on their part  
constituting negligence. 33 Cyc. 1015 to 1017, inclusive.  
Even the trial court seemed to appreciate the fact that the  
verdict was wrong as to some, if not all, of the appellants.  
Respondents, however, attempt to meet this situation by the  
undisputed fact that appellants made no motion for a nonsuit  
at the close of plaintiff's evidence, nor any request for a di-  
rected verdict when the case was submitted to the jury. It is  
apparently assumed by respondent's counsel that, no matter  
how insufficient the evidence may be, or whether or not there

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is any evidence at all to support a particular hypothesis, if a party omits to move for a nonsuit, or to request a peremptory instruction, the court can give him no relief unless the court of its own motion sees fit to set the verdict aside. The trial court seemed to be imbued with the same idea. The record discloses that at the time the attempted appeal of defendant F. H. Gallagher was disposed of the court said:

"The record may show in this case that at the time the case was tried there was no motion for a nonsuit. The fact is the court expected the defendant's counsel to make a motion for nonsuit as to some of these defendants. The court also expected and looked for a motion for a directed verdict as to some of the defendants. That was not made, and it appears to the court that the defendant Gallagher desired to have all these parties retained for some purpose, thinking he would be benefited thereby. I also expected there would be a motion for a new trial on this ground. And at the time the motion for a new trial was made I asked the parties to proceed to argue. It was submitted without argument. There was no one here to press the motion, and if there had been a motion made, I want to say now, no doubt, some of these defendants, not designating which ones, would have been dismissed. This statement may be inserted in lieu of the court's inserting it in the settlement of the bill, because I want the Supreme Court to know just what the record was."

The excerpt quoted demonstrates conclusively that the trial court not only understood that the evidence against some of the defendants was insufficient to sustain a ver- 3  
dict against them, but also considered itself powerless to grant relief. In this respect the court was in error. Understanding and viewing the case as it did, the just and prudent thing for the court to have done would have been to set the verdict aside. Comp. Laws Utah 1917, section 6983, provides:

"The verdict of a jury may also be vacated and a new trial granted by the court in which the action is pending on its own motion, without the application of either of the parties, when there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice."

We are not disposed, however, to go so far as to hold that the court committed reversible error in failing to act

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upon its own motion. Besides, the failure of the court 4  
to act in the present case is not assigned as error, and.  
if it had been, such assignment should not prevail. *Hartford  
Life Ann. Ins. Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671,  
36 L. Ed. 496; *Home Fire Ins. Co. v. Phelps*, 51 Neb. 623, 71  
N. W. 303; *Johnson v. London G. & A. Co.*, 115 Mich. 86, 72  
N. W. 1115, 40 L. R. A. 440, 69 Am. St. Rep. 549. It would  
be an extreme case in which a trial court should be held re-  
sponsible for not acting upon its own motion in behalf of a  
party litigant when that party by himself or counsel fails or  
neglects to seasonably make a request or motion, for such  
action on the part of the court. Our only justification for  
dwelling upon this matter is because the question was mooted  
in the oral argument.

Notwithstanding appellants omitted to move for a nonsuit  
or request a directed verdict, they did, nevertheless,  
move for a new trial on several grounds, one of which 5  
was insufficiency of the evidence to justify the verdict.  
That was equivalent to a request for a directed verdict and  
should have the same effect on appeal. The fact that the mo-  
tion was submitted without argument and disposed of by the  
court without specification of the particulars in which the  
evidence was claimed to be insufficient does not alter the case.  
The trial court heard the facts at the trial. A motion for new  
trial on the grounds of insufficiency of the evidence was suffi-  
cient as a remainder and made it the duty of the cour to  
review the evidence. The notice and motion was a full com-  
pliance with the provisions of Comp. Laws Utah 1917, sec-  
tions 6978 and 6979, relating to notice and motion for a new  
trial.

If, however, after failing to move for a directed verdict,  
appellants had also failed to move for a new trial on the  
grounds mentioned, respondent's contention would have been  
correct and amply sustained by many of the authorities cited.  
*Reed v. Scott*, 50 Okl. 757, 151 Pac. 484; *Wakely v. Johnson*,  
115 Mich. 285, 73 N. W. 238; *Shmit v. Day et al.*, 27 Or. 110,  
39 Pac. 870; *Seeman et al. v. Levine et al.*, 205 N. Y. 514, 99  
N. E. 158; *Oaks v. Samples*, 57 Okl. 660, 157 Pac. 739; *Hei-*

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*man v. Felder*, 178 Iowa, 740, 160 N. W. 234; *Barcus v. Prokop*, 29 S. D. 39, 135 N. W. 756.

Many of the cases last cited go to the full extent claimed by respondent, that moving for a new trial on the grounds of insufficiency of the evidence and adverse ruling thereon excepted to will not save the question on appeal. Within the purview of those cases the question can only be raised by motion for a nonsuit or by request for directed verdict. Such seems to be the effect of the decisions cited from Oregon and Oklahoma.

But, whatever may be the holding of the courts in other states under their local statutes upon this important question of practice, the question here is no longer 6 open. It was definitely and conclusively determined in the case of *Law v. Smith*, 34 Utah, 395, 98 Pac. 300. The case is a leading one in this jurisdiction and deserves more than a passing notice. The plaintiff, Law, as county attorney of Cache county, brought an action, under certain provisions of the statute, against the sheriff of the same county to remove him from office. The case was tried to a jury. At the close of the evidence each of the parties moved the court for a directed verdict in his favor. The court refused the motion of plaintiff, granted the motion of defendant, and judgment was entered accordingly. Plaintiff, without moving for a new trial, appealed from the judgment, assigning as error the refusal of the court to grant his motion and also the ruling in favor of defendant. Respondent, on appeal, contended that this court could not review the evidence because no motion had been made in the court below for a new trial. The court held against this contention, reversed the judgment, and granted plaintiff a new trial. The reasons given are cogent and convincing. The opinion, written by Mr. Justice FRICK, was unanimously concurred in by his associates. After stating argumentatively the reason for its conclusion, the court said:

"So, likewise, in case a party desires to challenge the verdict of a jury upon the ground that the verdict is not sustained by the evidence, he must do so by a motion for a new trial, unless during the trial he raised the legal question involved by a motion for a



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nonsuit or for a directed verdict. Unless he has presented either a motion for a nonsuit or for a directed verdict, the trial court has had no opportunity to pass upon the legal sufficiency of the evidence during the trial, and cannot do so unless a motion for a new trial upon the ground of the insufficiency of the evidence is presented to it. When, however, a motion for a nonsuit or a motion for a directed verdict has been made and ruled upon, the court has had the opportunity to pass upon the legal sufficiency of the evidence precisely the same as upon a motion for a new trial, and hence the latter motion, for the purposes of a review, may be dispensed with. In this way all the orders, rulings, and decisions of the trial court, whether made during the trial or on motion for a new trial, can be brought before this court for review, and on all of them the court need to pass judgment but once. Any other holding would bring about the incongruity of requiring the trial court to pass twice on some matters, while it may do so but once on others."

It is not necessary to interpose any explanation as to the meaning of the language quoted. It is self-explanatory, and in the opinion of the writer effectually determines the law of this jurisdiction upon the point in question. The decision in that case is clearly decisive of the question presented here, and, as the court as now constituted is in hearty accord with both the conclusions reached and the reasons given therefor, we feel both legally and morally bound to adopt the rule there laid down as controlling in the case at bar.

Counsel for respondent have referred to several Utah cases all of which go to the point that this court will not consider questions not raised in the trial court. As such cases have no application whatever to the question presented here, we have not taken the trouble to cite them in this opinion.

The judgment of the trial court as to appellants is reversed, and the cause remanded for a new trial. Appellants are awarded costs on appeal.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

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**JENSEN v. HINCKLEY**, Superintendent of State Industrial School.

No. 3410. Decided December 1, 1919. (185 Pac. 716.)

1. **INFANTS—NOTICE OF DELINQUENCY HEARING JURISDICTIONAL.** Service of notice under Comp. Laws 1917, section 1818, or voluntary appearance amounting to waiver, is necessary to confer jurisdiction on the juvenile court to determine right to custody of a delinquent child, but not to confer jurisdiction, pursuant to section 1815, to determine delinquency.<sup>1</sup> (Page 310.)
2. **INFANTS—No "WAIVER" OF NOTICE OF DELINQUENCY PROCEEDINGS BY APPEARANCE OF PARENT AS WITNESS.** The mother of a minor son, against whom a delinquency complaint had been filed in the juvenile court pursuant to Comp. Laws 1917, section 1815, and not served with notice thereof, as required by section 1818, held not to have waived service of notice by appearing in court merely as a witness; "waiver" being an intentional relinquishment of a known right.<sup>2</sup> (Page 311.)

Appeal from District Court of Salt Lake County, Third District; *Wm. H. Bramel*, Judge.

Habeas corpus by Louise Jensen against E. S. Hinckley, Superintendent of the Utah State Industrial School.

From judgment quashing the writ and remanding petitioner's son to custody, petitioner appeals.

Judgment remanding the son to custody VACATED and ANNULLED, and release and restoration of custody to petitioner ordered.

*A. A. Duncan*, of Salt Lake City, for appellant.

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<sup>1</sup> *Mill v. Brown*, 31 Utah, 475, 88 Pac. 609, 120 Am. St. Rep. 960; *Stoker v. Gowans*, 45 Utah, 556, 147 Pac. 911, Ann. Cas. 1916E, 1025.

<sup>2</sup> *Schupab Safe & Lock Co. v. Snow*, 47 Utah, 211, 152 Pac. 171; *O'Donnell v. Parker*, 48 Utah, 578, 160 Pac. 1192.

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Appeal from Third District.

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*Dan B. Shields*, Atty. Gen., and *O. C. Dalby*, *James H. Wolfe*, and *H. Van Dam, Jr.*, Asst. Attys. Gen., for respondent.

FRICK, J.

The plaintiff, hereinafter called petitioner, filed her petition in the district court of Salt Lake county alleging in substance that Gunnard Jensen, her son, a minor fourteen years of age, is unlawfully restrained of his liberty by the defendant as superintendent of the state industrial school, setting forth the facts respecting the illegality of the detention and praying that a writ of *habeas corpus* issue on behalf of said minor. A writ was duly issued by said court to which the defendant made due return, and, upon a hearing upon the petition and return, the writ was quashed, and the minor was remanded to the custody of the defendant, where said minor now is.

The petitioner appeals from the judgment of the district court remanding said minor as aforesaid.

The facts, all of which are conceded, in substance are: That on July 31, 1919, a complaint was duly filed in the juvenile court of Salt Lake county in which said minor was charged with an act of delinquency, to wit, the taking and driving away of an automobile belonging to another without the knowledge or consent of the owner; that on August 5, 1919, a hearing was had on said charge; that at said hearing the minor admitted the facts charged; that the petitioner, who is the mother of said minor, appeared in the juvenile court at said hearing and gave testimony under oath; that the juvenile court found that the minor was a delinquent within the purview of our statute, and also found that his parents "are unfit to have and continue in the custody of said minor child by reason of the fact that the boy is not amenable to the wishes of his parents and the parents have been unable to give him the training which would keep him away from such offenses."

The juvenile court therefore entered an order or judgment committing the minor to the industrial school aforesaid, and by virtue of that order he was placed into and now is in the custody of defendant.

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The record discloses the fact that the notice provided by Comp. Laws Utah 1917, section 1818, was not served on the parents of the minor nor upon either one of them. That section reads as follows:

"Upon filing such complaint, the clerk or court shall set the same for hearing; notice of said hearing shall be served by the probation officer, or sheriff or any peace officer, on the parents, parent, custodian, or legal guardian of said child residing within the state of Utah, which notice shall be substantially in the following form, to wit:

"(Title of court and cause.)

"To — (here designate relationship): You are hereby notified to appear within two days after the service of this notice upon you, if served within the county wherein the above proceeding is pending, otherwise within five days, and assert and defend any rights to custody, control, or guardianship you may have or claim over or in the above-named child; otherwise your default will be entered and the court will proceed to hear and determine your said rights or supposed rights in accordance with the law and the evidence.

"The return of the officer showing such service shall be conclusive."

Comp. Laws Utah 1917, section 1815, defines the jurisdiction of the juvenile courts of this state. That section reads:

"The juvenile court shall have jurisdiction in all cases relating to the custody, detention, guardianship of the person, probation, neglect, dependency, delinquency, examination, trial, and care of children who are under eighteen years of age, and also have jurisdiction over adult persons for all misdemeanors committed by them relating to the custody, detention, guardianship, probation, neglect, dependency, delinquency, and care of children who are under eighteen years of age, as is now or may be provided by law. In any case in which the court shall find a child neglected, dependent, or delinquent, it may, in the same or in any subsequent proceedings, upon the parents of said child or either of them being duly summoned or voluntarily appearing, proceed to inquire into the ability of such parent or parents to support the child or contribute thereto. The court may enter such order or decree as shall be according to equity in the premises, and may enforce the same in any way in which a court of equity may enforce its orders or decrees."

Counsel for the petitioner contends that in view that the notice provided for in section 1818 *supra*, was not served upon the parents of the minor, nor upon either one of them, therefore the juvenile court exceeded its power or jurisdiction in

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entering judgment that the parents of such minor were unfit to retain the custody of him. In that connection counsel contends that under the decision of this court in *Mill v. Brown*, 31 Utah, 475, 88 Pac. 609, 120 Am. St. Rep. 960, it is necessary for the juvenile court to find: (1) That the minor is a delinquent within the purview of our statute, and (2) that the parents are morally unfit to continue in the custody of the child. He further insists that, in order to determine and adjudicate the right to the custody of the parents, it is essential that they be served with the statutory notice or that they voluntarily appear and waive such notice. He vigorously insists that the finding of both of the foregoing facts is essential to the jurisdiction of the juvenile court. Upon the other hand, the Attorney General, who appears on behalf of the defendant, while conceding that the notice is jurisdictional and that the facts must be found as stated in the case of *Mill v. Brown*, supra, nevertheless, contends that, inasmuch as the petitioner appeared in the juvenile court as aforesaid, she waived notice, and therefore the juvenile court did not exceed its jurisdiction in adjudicating that the parents of said minor were unfit to continue in the custody of him. In support of his contention the Attorney General cites and relies on the following cases: *De Kay v. Oliver*, 161 Iowa, 550, 143 N. W. 508; *King v. Sears*, 177 Iowa, 163, 158 N. W. 513; *Heber v. Drake* (Ind. App.) 118 N. E. 864; *Juvenile Court of Shelby County v. State*, 139 Tenn. 549, 201 S. W. 771, Ann. Cas. 1918D, 752.

We shall again refer to those cases.

It will be observed that in section 1818, supra, it is required that the notice be served as there provided, or that a voluntary appearance be made as provided in section 1815. That such a notice is necessary to confer jurisdiction upon the juvenile court to determine and adjudicate the fitness or unfitness of the parent, guardian, or custodian of the minor child to have custody of such child, is assumed rather than decided by this court in the case of *Stoker v. Gowans*, 45 Utah, 556, 147 Pac. 911, Ann. Cas. 1916E, 1025. We are clearly of the opinion, however, and now hold, that the service of such notice or

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voluntary appearance amounting in legal effect to a waiver thereof is necessary to confer jurisdiction upon the juvenile court for the purpose of determining and adjudicating the parent's or guardian's right to custody of a delinquent child. Lest we be misunderstood, however, we desire to state here that the service of such a notice is not necessary to confer jurisdiction upon the juvenile court in order to determine and to adjudicate the delinquency of the child. That fact may be determined by the juvenile court upon a hearing on the charge preferred against the child without notice to the parents. That court may, however, not go farther and also adjudge the parent's or guardian's right to the custody of the child, as the case may be, without serving the notice aforesaid, or, in lieu thereof, making a finding upon proper evidence that the parent, etc., voluntarily appeared and by that means waived notice. This case affords a striking illustration of the injustice that might result to parents, especially if they are poor, if their unfitness to have custody of their own child could be determined against them without notice or without an opportunity to waive such notice. The minor in question here is but fourteen years of age. The judgment of the juvenile court committing him to the state industrial school under our statute may continue in effect until he has reached the age of majority, when, for that reason alone, he must be discharged from the institution. When he has attained that age, however, the parent or guardian is deprived of the right of custody by virtue of law. If therefore an adjudication of the parent's right to custody can be made without notice or voluntary appearance amounting in legal effect to a waiver of notice, a parent may be deprived of the right of custody for and during the major portion of the child's minority, without giving such parent any right to be heard upon his fitness and right to the custody of his own child. Surely such a result should be avoided in this enlightened age if possible.

The Attorney General does not contest the foregoing propositions, but he insists that the petitioner by her voluntary appearance waived the statutory notice and conferred juris-

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diction upon the juvenile court. The question therefore is: Did she do so? The facts upon that subject are specifically found by the district court and are as follows:

"That no formal notice of the said proceeding or of the said hearing was given to or served upon the plaintiff, Louise Jensen, the mother of said minor, and the said Louise Jensen did not expressly waive notice of the said proceedings, or of the said hearing; that the said hearing was had at the time so set and at the said hearing the said plaintiff, Louise Jensen, was present in court and while there was called as a witness by the judge of said court and was asked and she answered certain questions that were put to her by the judge and gave evidence, but the questions and answers are not of record, and the subject-matter of her testimony does not appear from the record of said hearing; that the record does not show whether or not the said Louise Jensen was informed that her custody of the said minor was involved in said proceeding or that she would be called upon to defend any right she had to the custody of said minor or to present evidence of her fitness or unfitness to have the custody of said minor."

From those facts the district court found as a conclusion of law that the petitioner waived the service of notice and that the juvenile court had jurisdiction to adjudicate the right of the custody of the minor.

It is conceded that the father of the minor was temporarily absent from the state of Utah at the time of the hearing and knew nothing concerning the matter.

Do the facts as found justify the contention that the petitioner waived the service of the statutory notice by appearing in court as stated in the findings? We are all 2 of one mind that they do not. In 4 Words and Phrases, Second Series, 1231, "waiver," as applicable to a situation like the one at bar, is defined thus:

"A 'waiver' is an 'intentional relinquishment of a known right, and there can be no waiver, unless the person against whom the waiver is claimed had full knowledge of his rights. \* \* \* Neither will waiver be implied from slight circumstances, but must be evidenced by an unequivocal and decisive act clearly proven.' To be valid a waiver must be made intentionally and voluntarily. The existence of an intent to waive is a question of fact, and must be made to clearly appear"—citing *Hopkins v. Northwestern Nat. Life Ins. Co.*, 41 Wash. 592, 83 Pac. 1019, 1020, 1021.

This court is committed to the doctrine there stated.

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*Schwab Safe & Lock Co. v. Snow*, 47 Utah, 211, 152 Pac. 171, and *O'Donnell v. Parker*, 48 Utah, 578, 160 Pac. 1192.

True, if the petitioner had testified respecting her right to the custody, or had been heard, or had been given the opportunity and right of being heard upon that question, it might well be that she had waived the right to notice for the reason that she had been afforded an opportunity to exercise the right for which notice is contemplated by the statute. The record being silent upon that subject, however, we cannot assume that she testified respecting her right to custody; nor, in the face of the findings of the district court which we have before set forth, can it be said as a matter of law that she waived any right. Indeed those findings lead to a precisely opposite conclusion. Nor, in view of said findings, is there anything in the cases cited by the Attorney General to which we have referred which leads to a conclusion different from that we have arrived at. Indeed, the facts in every case cited, except the case of *Juvenile Court v. State*, 139 Tenn. 549, 201 S. W. 771, Ann. Cas. 1918D, 752, are clearly distinguishable from those in the case at bar. In the Tennessee case the court found that the mother by her acts and conduct in court and with the juvenile court officers had waived the statutory notice. As we have already pointed out, however, such a conclusion under the facts found in this case is not permissible. It is not necessary to devote further time to a review of those cases.

It follows from what has been said that the juvenile court exceeded its power in adjudging that the petitioner and her husband were unfit custodians of the minor. It does not follow from that, however, that the said court was also without jurisdiction to determine and to adjudicate the delinquency of the minor. As we have seen, no notice to the parents is necessary to determine that question. Section 1815, *supra*, clearly contemplates that the hearing to determine delinquency of a child is one thing, while the hearing to determine the parent's or guardian's fitness or unfitness to continue in the custody of the delinquent is quite another thing. The language of the statute is:



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"In any case in which the court shall find a child neglected, dependent, or delinquent, it may, in the same or in any subsequent proceedings, upon the parents of said child or either of them being duly summoned or voluntarily appearing, proceed to inquire into the ability," etc., of the parent, etc.

As a matter of course, if a child should be charged with an act of delinquency and the juvenile court should find that the charge was unfounded and thus would discharge the child, notice to the parents would be wholly useless and therefore unnecessary. It is only after the court has found the child to be a delinquent that its custody may be drawn in question, and it is then that the parents or guardian must be notified. The court, in its discretion, as is clearly contemplated by the statute, may, however, notify the parents before it proceeds to inquire into the charge preferred against the child and before it determines the question of delinquency, and it would seem that to follow that course would be preferable in order to give the parent an opportunity to be heard upon that question as well as upon the question of custody. The statute also provides that it is sufficient if only one of the parents be notified or if only one of them voluntarily appear. Whether one parent may waive the right of the other parent, or whether notice upon one alone will bind the other, in case the other is within the jurisdiction of the court and can be served with notice, is not before us for determination, and we express no opinion upon those questions. All that we now hold is that the statutory notice is jurisdictional and that, unless such a notice is served or service thereof is waived as hereinbefore stated, the juvenile court is without jurisdiction to determine the parent's right to the custody of the delinquent child.

The only remaining question is: What order or judgment should be entered in this case? The juvenile court clearly had jurisdiction to determine the delinquency of the minor. That order or judgment, therefore must stand. The court, however, was powerless to determine the right to the custody of the parent, and hence that question remains undetermined. The petitioner has therefore been unlawfully deprived of her right of custody of her own child, and the defendant is unlawfully exercising the right of custody and control over him.

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While the minor must thus be restored to the custody of the petitioner, yet to do that in no way affects the judgment of the minor's delinquency. In pursuance of that judgment, therefore, the juvenile court by complying with the statutory requirement respecting notice may at any time proceed to hear the evidence relating to and determine the fitness of the parents.

It is therefore ordered and adjudged that that part of the judgment of the juvenile court by which said minor is committed to the state industrial school is void and of no effect, and the same is hereby annulled; that the judgment of the district court remanding said minor into the custody of the defendant is also vacated, set aside, and annulled; and it is hereby ordered that the defendant forthwith release said minor from custody, and that his custody be restored to the petitioner until her right to custody be legally determined and in accordance with the views herein expressed.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

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STATE v. TERRELL.

No. 3377. Decided Dec. 2, 1919. (186 Pac. 108.)

1. BURGLARY—RABBIT PENS MAY BE BURGLARIZED. Rabbit pens in a back yard permanently constructed for the purpose of housing rabbits are embraced within the kind of structures that may be burglarized, under Comp. Laws 1917, section 8259. (Page 321.)
2. ASSAULT AND BATTERY—JUSTIFICATION OF ASSAULT WITH DEADLY WEAPON. The same rules of law are applicable with respect to justification in cases of assault with a deadly weapon with intent to do bodily harm as in cases of homicide, and one accused of such an assault may invoke Comp. Laws 1917, section 8032, relating to justifiable homicide. (Page 321.)
3. ASSAULT AND BATTERY—JUSTIFICATION IN DEFENSE OF PROPERTY. In a prosecution for assault with a deadly weapon with intent to do bodily harm, accused having shot one burglarizing his rabbit pens, the fact as to whether or not there was a reasonable necessity for the shooting under Comp. Laws 1917, section 8032,

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was a question to be determined from the testimony by the jury under proper instructions. (Page 321.)

4. **ASSAULT AND BATTERY—HOMICIDE—FORCE MUST BE REASONABLY NECESSARY TO CONSTITUTE JUSTIFICATION.** Homicide or an assault with a deadly weapon cannot be justified under Comp. Laws 1917, section 8032, unless in the necessary defense of habitation, property, or person, and, if the necessity fails, the right to invoke the statute falls, and, although the necessity need not be real, it must be reasonably apparent, and the resistance offered in good faith, upon reasonable grounds of belief that the invasion of some right created by the statute is being made by the offender, in which case only such force may be employed as may be reasonably required to successfully repel the invader, in view of section 8033 and section 8561, subd. 2. (Page 321.)
5. **ASSAULT AND BATTERY—HOMICIDE—JUSTIFICATION AT COMMON LAW.** Under the common law, the rule was that homicide or an assault with a deadly weapon could not be justified in the defense of habitation, property, or person, unless there was an actual necessity for the act. (Page 322.)
6. **CRIMINAL LAW—INSTRUCTIONS AS TO JUSTIFIABLE HOMICIDE ERRONEOUS.** In a prosecution for assault with a deadly weapon with intent to do bodily harm, instructions defining burglary, and stating that "one may kill to save life or limb or prevent a great crime, \* \* \* but not to restrain commission of a misdemeanor," and "a felony is a crime which may be punishable with death or imprisonment in the state prison," and that "every other crime is a misdemeanor," were erroneous, where the court failed to state whether burglary constituted a "great crime," a felony, or a misdemeanor, or whether burglary was punishable by imprisonment in the state's prison, but instructed that larceny is "a secret crime not attended with force," and the "killing of one person by another or the attempt to kill to prevent larceny of a small amount, such as petit larceny, is not justified"; the complaining witness having been shot while burglarizing a rabbit pen. (Page 324.)
7. **CRIMINAL LAW—REFUSAL TO GIVE REQUESTED INSTRUCTION CONCERNING JUSTIFICATION ERROR.** In a prosecution for assault with a deadly weapon with intent to inflict bodily harm, defendant having shot another who was burglarizing his rabbit pen, a request for an instruction, "If you believe that when complaining witness, R., was shot he was committing a burglary and stealing defendant's rabbits, then defendant was justified in shooting," although such instruction could not have been properly given without a qualification, rendered it error for the court not to

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give the substance of such instruction with proper qualifications. (Page 325.)

8. **HOMICIDE—INFANTS—JUSTIFICATION FOR SLAYING CHILD.** Notwithstanding Comp. Laws 1917, sections 1829, 7915, a child between 7 and 14 years of age may violate the law and commit an offense against person or property the same as an adult person and it cannot be said as a matter of law that such a child cannot be shot in defense of habitation, property, or person under section 8032, subd. 2. (Page 326.)

Appeal from District Court of Salt Lake County, Third District; *John F. Tobin*, Judge.

Dennis F. Terrell was convicted of an assault with a deadly weapon with intent to do bodily harm, and he appeals.

REVERSED and REMANDED, with instructions to grant a new trial.

*Olson & Lewis*, of Salt Lake City, for appellant.

*Dan B. Shields*, Atty. Gen., and *O. C. Dalby*, *Jas. H. Wolfe*, and *H. Van Dam, Jr.*, Asst. Attys. Gen., for the State.

CORFMAN, C. J.

The defendant was charged by the information in two counts: (1) Assault with intent to commit murder; and (2) assault with a deadly weapon with intent to do bodily harm. A plea of not guilty was entered to each count of the information, and upon the trial the defendant was convicted of an assault with a deadly weapon with intent to do bodily harm, and was sentenced by the court to an indeterminate term of imprisonment after denial of motion for a new trial. Defendant appeals.

The assignments of error complained of on the appeal are based entirely upon certain instructions given and the failure of the court to charge the jury as requested by the defendant. In substance, the testimony shows: That the defendant, Dennis F. Terrell, is a barber by trade, but prior to May 17, 1918,

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the day upon which the offense with which he was charged and convicted occurred, was engaged in the work of a street car conductor. He owned a home in the southwestern part of Salt Lake City, which he occupied with his family. Situated upon his city lot or home premises, besides a dwelling house, were several sheds, a toilet, chicken run, and rabbit pens within an enclosure fenced with posts and woven wire. Between the inclosure and the portion of the premises occupied by the dwelling and other out-buildings an open alleyway extended east and west. Within the inclosure above referred to were a couple of sheds situated at the southwest corner, abutting on the alleyway. The doors to the sheds opened to the north. North and to the east of the sheds were the rabbit pens with their doors opening to the south. There was an open space through the inclosure about ten feet wide between the rabbit pens and the sheds, and beyond the sheds to the east this open space was approximately twenty feet in width. The entrance to the woven wire inclosure was from the west, by a swinging gateway, near the doors at the northwest corner of the sheds. Seventeen feet east of the westerly fence line of the inclosure and northeasterly from the doors of the sheds the rabbit pens were constructed, extending easterly for a distance of thirty feet. The rabbit pens were connected and built in tiers, for the most part two and three tiers in height, their roofs tilting to the north. They were built largely upon 2x4 sills with the same materials supporting the roofs, with no uprights except one-inch boards nailed to the sills and 2x4 supporting the roofs. The testimony of the state's witness, the county surveyor, was to the effect that the rabbit pens, as constructed, have no indication that they were portable or designed to be moved; that they covered the space of ground there, and apparently were permanently constructed for the purpose of housing some sort of animal, and not designed to be moved from place to place. The county surveyor also testified that there was a street light, at a height of twenty-five feet from the ground, about 250 feet east and 150 feet north from the southeast corner of the defendant's property, which, in his judgment, would cause a shadow to be cast in the night-time

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across the space intervening between the rabbit pens and the chicken run situated immediately to the east of the sheds within the inclosure. The defendant, on May 17, 1918, the day he is charged with the offense complained of, was, and for some time prior thereto had been, engaged in raising and selling rabbits, and had at times sheltered as many as sixty rabbits in the pens. He testified that for some time prior to May 17, 1918, he had been missing rabbits from the pens, and that in order to catch the intruder or thief he had been sleeping in the shed at the southwest corner of the inclosure. On the above date, at about 10 o'clock in the evening, he undressed himself at his dwelling, put on a bathrobe and went out to the inclosure where the rabbit pens were, examined the doors and their latches, ascertained that the rabbits were secure in the pens, and then retired upon a cot in the shed at the southwest corner of the inclosure. Shortly after retiring he heard voices in the alleyway leading through his premises. After hearing the voices he heard no further sounds until he heard the rabbits jumping or pounding with their feet. As to what followed, the defendant testified:

"When I heard the first noise with the rabbits, I just raised up; must have been asleep, I guess. And then I heard one of them squeal, I got out of bed. I got out of bed, and I had an old wire fastened on the door nailed on the inside to hold it shut, to keep the wind from blowing in and keeping me awake at nights. I unwrapped the wire off the nail and pushed the door open. I had a gun standing there in reach. I went in the open doorway and looked and saw the door of the rabbit pen open, the east hutch. I did not realize at the time whether it was the east hutch or the second one, but I noticed one of them standing open, and when I did, I was fully convinced of the fact that some one was stealing my rabbits, and I took up my gun and looked, and I thought I saw some one moving, and when I did I shot. I pointed the gun down low intentionally. I didn't intend to hit any person that was there in any vital part, but purposely aimed low. When I shot, there was no outcry, no noise made. I was standing with one foot in the shed and one foot out, and I heard no one after shooting, and I looked and could see no one, or hear anything, and I came to the conclusion I must have been mistaken, that I had been too slow in getting out, and they had got away, so I started to walk over toward the rabbit pens slowly, and when I got over well past the shed on the south where the ground is raised on the west end where it first starts to

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raise, just as I had my foot on that, a voice from the ground said 'Mister, will you please help me up?' I looked, and I could hardly distinguish the form that was lying on the ground, but the voice when I heard it brought to me the awful fact that it was a boy. I didn't think, I never had the least thought or any kind of intimation before that time, that it was a boy. I said to him, 'Get up yourself.' I really thought I had not hit anything when I shot, even after he spoke and I said, 'Get up yourself,' and he said, 'I can't; my knees hurt.' I walked over to him and put my hands under his shoulder and helped the boy up. \* \* \* I put my left arm around him and put my gun in my right hand, and helped him to the house, and put him on a chair. When I turned on the light, I saw black socks on him that were dyed, so I took the socks down and got into my clothes, and went across the street to a neighbor's and phoned the Emergency Hospital, and told them what I had done and to get down as quick as possible. I reported to the police department. When I went over to the pens first, the door on the east pen was open, the only one that was standing open. The latch on the next one was turned straight up and down, so it could open and that one would not stay open unless it was held open because the hinges are heavy leather and swing shut when they are released. The east one will stand open. When I got over there, there were two rabbits on the ground out of the pen. One was running along to the west, and the other one hopped across in front of me toward the chicken house. When I went to investigate the rabbits that were in the pen, there were five in one pen and four in the other. Two of them I saw on the ground. \* \* \* In my judgment, it was necessary to shoot that night under the circumstances, not knowing who it was that was out there at the time, and the fact that I never realized, never once thought, that it was a boy that had been taking my rabbits, it became necessary to that extent that I was under the impression that there was more than one there, and that I was going up against somebody that perhaps was prepared to take a shot at me or something, in case I let them know I was there. I didn't think that it was a boy that stole the rabbits the nights before April 30th, and not a man. I thought I was in physical danger at the time that I shot from the fact that somebody was stealing my property, if I should go out and say anything to them or let them know that I was there. I shot because of the fact that if I hit them they would not be able to put up much of a fight, and it would stop them from taking my property, and it would lessen my physical danger. I wanted to be sure they didn't take a shot at me. It was absolutely necessary for me to shoot, although, as it turned out afterwards, it would not have been necessary. I was thoroughly satisfied at the time, or at least I thought I was, not being able to distinguish who or what it was at the rabbit

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pens. Not for a positive fact, I couldn't see any one. There was an object of some kind moving, and I shot at it."

Ray Cowan, the complaining witness, a boy twelve years of age, testified that he and a younger brother on the day of the offense complained of had been visiting with their parents at the home of an aunt residing south and west of the defendant's premises; that upon leaving their aunt's residence between nine and ten o'clock in the evening they separated from their parents and taking a short cut homeward passed through the alleyway on the Terrell premises. The younger brother became frightened at some shadows, and thereupon they turned back into the alley. In passing through the alley over defendant's premises the witness, Ray Cowan, was attracted to the rabbits, and he opened the gate leading to the inclosure, passed in and to the rabbit pens, opened the doors to the easterly pens for the purpose, and was in the act of petting the rabbits, and not acting with any purpose of stealing them, when he was shot in the knees by the defendant, from the front door of the west shed.

Other witnesses testified that the boy, after the shooting, admitted that he intended to take rabbits. The boy denied having made the admission.

After the shooting occurred and the boy had been taken to the Emergency Hospital a rabbit was found in his waistcoat, but the boy denied any knowledge as to how it came to be there.

The theory of the defense was that the shooting was justifiable under the circumstances; that the boy was engaged in the commission of a burglary, and therefore the defendant had the right to shoot to prevent him. The state contends that the boy was only a trespasser, or at most his conduct, under all the circumstances, regardless of whether or not it was his intent merely to pet the rabbits or to steal them, would not justify the defendant in shooting him.

As we read the record, there was no question raised before the trial court as to the character of the rabbit pens, not being the kind of buildings or structures that might be burglarized under the statute if broken and entered into for the purpose



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of committing larceny. However, it is contended by the state on the appeal that the pens were not such structures within the meaning of the statute as might be burglarized. In so far as may be material for the purposes of the consideration of the case on appeal. Section 8259, Comp. Laws 1917, provides:

"Every person who, in the night-time, forcibly breaks and enters, or without force enters an open door, window, or other aperture of any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, or any tent, vessel, water craft, or railroad car, with intent to commit larceny or any felony, is guilty of burglary in the second degree."

In view of the foregoing statute, we think the theory on which the trial court proceeded in treating the rabbit pens as embraced within the kind of structures that 1 may be burglarized was the right one.

It was an admitted fact that the defendant shot and inflicted great bodily injury upon the boy, Ray Cowan. It is also conceded that the same rules of law are applicable with respect to justification in cases of assault with a deadly weapon with intent to do bodily harm as in cases of homicide. Under the provisions of our statute, and in so far as may be material to the case under consideration, subdivision 2 of section 8032, Comp. Laws 1917, provides that homicide is justifiable "when committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony." The appellant invokes the foregoing statute in making his contention that his act in shooting the boy was justifiable; that the assault was made while the boy was in the act of committing larceny; that larceny committed under the circumstances here, within the meaning of section 8259 of our statutes, quoted above, constituted the crime of burglary; and that burglary is a felony.

While we recognize the right of the defendant to invoke the foregoing statute under the circumstances that attended the shooting of the boy, yet the fact as to whether or 2-4 not there was a reasonable necessity for the defendant to use the means employed by him to prevent the taking of his property remained a question to be determined, from the

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testimony, by the jury under proper instructions to be given by the court. As a matter of law in any given case homicide or an assault with a deadly weapon cannot be justified unless in the necessary defense of habitation, property, or person. If the necessity fails, the right to invoke the statute fails. The necessity need not be real; it need be only reasonably apparent, and the resistance offered in good faith, upon reasonable grounds of belief that the invasion of some right accorded by the statute is being made by the offender, and then only such force may be employed as may be reasonably required to successfully repel the invader.

Under the common-law doctrine the rule was that there must have been an actual necessity for the act, but under the statutes and the decisions of the courts of the 5 several states this rule has been modified, and it is now generally held that homicide is justifiable if there exists in the mind of the slayer a reasonable belief that the necessity exists. Wharton on Homicide, page 767, sections 515, 516; 13 P. C. L. p. 807, section 112; 1 Michie on Homicide, p. 319, section 107. Something more, however, is required under our statute than a bare fear on the part of the slayer that an offense is about to be committed against his habitation, person, or property. Section 8033 provides:

"A bare fear of the commission of any of the offenses mentioned in subds. 2 and 3 of the preceding section [8032], to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted wholly under the influence of such fears."

The degree of force that may be exercised in preventing the commission of an offense against property must necessarily vary according to the situation of the parties and the circumstances surrounding a given case. It is expressly provided by subdivision 2 of section 8561 that sufficient resistance may be exercised by a person "to prevent an illegal attempt by force to take or injure property in his lawful possession." We think this statute necessarily negatives the right to exercise any greater degree of force or resistance in any case than may be reasonably necessary to repel the offender or

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prevent the commission of the crime that is being undertaken. Again, the question as to whether or not in a given case a greater degree of force by way of resistance was exercised than was reasonably necessary becomes one of fact to be determined by the jury under proper instructions of the court. In view of the situation of the parties, the condition and circumstances surrounding the defendant at the time of the alleged illegal assault, as disclosed by the testimony in the case before us, we can readily appreciate that the trial court may have met with considerable difficulty in seeking to properly charge the jury in matters of law applicable thereto. In that regard the defendant assigns as error the refusal of the trial court to give the following request:

"You are instructed that the taking of human life is justifiable when committed by any person in defense of property against one who manifestly intends or endeavors by violence or surprise to commit a burglary, and you are further instructed that every assault with intent to kill and every assault with a deadly weapon with intent to commit bodily harm or any lesser assault is justifiable under the same circumstances."

It is conceded that the foregoing request correctly states the law, but it is contended by the state that the instructions of the court given on this point were, in substance and effect, the same, and that therefore the request was properly refused.

The court charged that—

"In so far as material in this case, burglary is defined to be when any person in the night-time forcibly breaks and enters, or without force enters, an open door, window, or other aperture in any barn, stable, outhouse, or other building with intent to commit *larceny*." (*Italics ours.*)

The court then proceeded to further charge:

"One may kill to save life or limb, or prevent a great crime, \* \* \* but one is not justified in killing to restrain or prevent the commission of a misdemeanor." (*Italics ours.*)

The court also instructed that "a felony is a crime which is or may be punishable with death or imprisonment in the state prison," and that "every other crime is a misdemeanor." The trial court failed to tell the jury whether or not the crime of burglary constituted a "great crime," a felony or a misdemeanor, or whether or not burglary was punishable

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by imprisonment in the state prison. Further, the jury was told that larceny is "a secret crime not attended with force," and the "killing of one person by another, or the attempt to kill to prevent larceny of a small amount, such as petit larceny, is not justified." Then again the court failed to tell the jury what constituted the offense of petit larceny.

We think that under the facts and circumstances as disclosed by the record in this case the instructions, unexplained, as thus given by the court, were not only erroneous, but highly prejudicial to the substantial rights of the defendant. They most certainly would tend to confuse and befog 6 the minds of the jurors to the real issues to be determined by them in the case. Well might the jury have believed, under the instructions as given, that unless property intended to be taken was of great value, the owner might not lawfully resist the commission of the burglary under any circumstances to the extent of the force used by defendant. They might have very readily assumed that burglary did not constitute a felony; that larceny, or the taking of another's property unless of great value, under no circumstances would constitute the crime of burglary, and that the defendant's plea of justification was wholly without merit and not entitled to any consideration under the instructions as given them by the court.

The defendant also complains that the court erred in the refusal to instruct as follows:

"If you believe from the evidence that at the time the complaining witness, Ray Cowan, was shot, he was committing a burglary and engaged in stealing the defendant's rabbits, then the court instructs you that under the law the defendant was justified in shooting the person so engaged in burglary."

The foregoing instruction without any qualification is not the law. We have heretofore pointed out and endeavored to make clear that under our statutes the taking of life is justifiable only when reasonable necessity exists for it, to prevent the commission of the crimes enumerated in our statute with reference to justifiable homicide, that the facts and circumstances attending a particular case must govern and deter-

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mine the necessity, and that the courts cannot lay down a hard and fast rule that will be controlling in all cases.

As we view the testimony in this case, the defendant was not entitled to have the request given in form presented to the court without such a qualification that 7 would enable the jury, in their deliberations, to determine, after due consideration of all the attending circumstances, whether or not the defendant was justified in resorting to the extreme measure of shooting the complaining witness in order to prevent a burglary. We do not wish to be understood, however, that the giving of the defendant's request last above referred to would be error when accompanied with the further explanation on the part of the court as to when and when not, according to the situation of the parties and their surrounding circumstances, so high a degree of force may be legally exercised to prevent the commission of the crime of burglary. In other words, we hold that the requests of the defendant heretofore made correctly stated the law, and the court should have given them in substance and effect, not as abstract rules of law, but in conjunction with such other clear and concise statements of the law applicable to the facts and circumstances as were disclosed by the testimony in the case. We think the trial court failed to do this in the particulars pointed out, and that such failure was prejudicial to the interests of the defendant in having a fair trial, and therefore the judgment of conviction should not stand.

There was some contention made on the part of the Attorney General for the state, both in the oral and in his written argument before this court, to the effect that the complaining witness, being a minor, twelve years of age, was not chargeable with the crime of burglary, and therefore from every viewpoint of the case the defense of justification on the part of the defendant should be held unavailable. The Attorney General has cited us to no authorities on the question raised, and, if we correctly understand him, he does not seriously insist that his contention in this regard is the law, but that the question is a new one and ought to be now passed

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upon by this court. In this connection our attention is called to Comp. Laws Utah 1917, section 7915, which provides:

"All persons are capable of committing crimes except those belonging to the following classes:

"1. Children under the age of seven years;

"2. Children between the ages of seven years and fourteen years, in the absence of clear proof that at the time of committing the act charged against them they knew its wrongfulness."

(Also other classes not material here.)

It will be seen that under subdivision 2 of the foregoing statute children between the ages of seven years and fourteen years are presumed to be incapable of committing crime. However, the presumption is a rebuttable one, and may be overcome by testimony tending to show that he was mentally capable or actually appreciated the wrongfulness of his conduct. So far as the act itself is concerned, a child may violate the law and commit an offense against person or property the same as an adult person. When an offense such as burglary is committed by a child under eighteen years of age, it is deemed a "delinquent child," and is chargeable before and dealt with by our juvenile courts. Comp. Laws 1917, section 1829, provides:

"'Delinquent child' shall include any child eighteen years of age or under such age, who violates any law of this state, or any city or town ordinance, or who commits an offense not punishable by death or imprisonment for life."

As heretofore pointed out, homicide is justifiable under our statutes "when committed in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise to commit a felony." In this class of cases the authorities are practically unanimous that the slayer need only act upon appearances, and it is sufficient if he acts in good faith and has reasonable grounds to believe, and does believe, that under the circumstances his legal rights are being feloniously invaded and the necessity exists for the force used by him in the prevention of crime. *Michie on Homicide*, section 116, p. 374, vol. 1; *N. O. & N. E. Ry. v. Jopes*, 142 U. S. 19, 12 Sup. Ct. 109, 35 L. Ed. 919.

We are of the opinion that the principles announced by the

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foregoing authority, and in the case cited from the United States Supreme Court, are of universal application, and should be adhered to in the consideration of the defendant's plea of justification in the case at bar.

For the reasons heretofore given, the judgment must be reversed, and the cause remanded, with instructions to the court below to grant a new trial.

It is so ordered.

GIDEON and THURMAN, JJ., concur.

WEBER, J., being disqualified, did not participate herein.

FRICK, J. I concur with the Chief Justice in the view that the instructions of the district court are incomplete and were thus calculated to mislead the jury to the prejudice of the defendant. I am, however, not prepared to concede that under defendant's own version of the shooting of the little boy he, as a matter of law, was justified. Our statute (Comp. Laws Utah 1917, section 8032, subd. 2) only justifies the taking of human life when done "in defense of habitation, property, or person, against one who manifestly intends or endeavors, *by violence or surprise, to commit a felony,*" etc. (Italics mine.) The statute clearly requires that in order to justify the taking of human life there must be some actual, or at least threatened, violence or surprise. Merely to imagine or suspect that another is about to steal property, when the habitation is not being assailed in any way, does not justify the slaying of the intruder as I understand the law. Our statute is merely a declaration of the common law. See 1 East's Pleas of the Crown, 271. The only difference between the rule at common law and the rule under statutes like ours is that the danger need not be real or actual under the statute, but need only be reasonably apparent to the slayer. It is not sufficient, however, for the slayer merely to say that the danger appeared actual or real to him. Unless it appears from all the facts and circumstances in evidence that the slayer had good or sufficient cause to believe that there was imminent

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danger, he may not take life with impunity. The rule in that respect is well illustrated by the Supreme Court of California in the case of *People v. Glover*, 141 Cal. 238, 239, 74 Pac. 745. To the same effect is *People v. Walsh*, 43 Cal. 447. In the latter case, like in the one at bar, the shooting was without any challenge or investigation of any kind, and it was there held not to have been justified. In the case at bar the defendant did not even know that there was any one in fact at the rabbit boxes, and he shot without the slightest effort to ascertain whether there was in truth and in fact any one committing an act of violence or any other act. Under such circumstances I think the jury should at least be told that, unless the defendant had good cause to believe, and in good faith did believe, that some person was in fact committing an act of violence, and was by that means manifestly attempting or endeavoring to commit a felony, the shooting would not be justified.

In *Pond v. People*, 8 Mich. 177, Mr. Justice CAMPBELL, in his usual forcible style, states the law under a statute like ours in the following words:

"Where a felonious act is not of a violent or forcible character, as in picking pockets, and crimes partaking of fraud rather than force, there is no necessity, and therefore no justification, for homicide, unless possibly in some exceptional cases. The rule extends only to cases of felony; and in those it is lawful to resist force by force. If any forcible attempt is made, with a felonious intent against person or property, the person resisting is not obliged to retreat, but may pursue his adversary, if necessary, till he finds himself out of danger. Life may not properly be taken under this rule where the evil may be prevented by other means within the power of the person who interferes against the felon. Reasonable apprehension, however, is sufficient here, precisely as in all other cases."

To the same effect is *Weaver v. State*, 19 Tex. App. 568, 53 Am. Rep. 389, where it is said:

"Where a felony is threatened, the party may repel it, whether leveled at him or others; 'but the force of defense must be proportioned to the force of attack. It is but reasonable that the kind and amount of defense should be measurably proportioned to the amount and kind of danger.' 'A bona fide belief by the defendant that a felony is in process of commission, which can only be ar-



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rested by the death of the supposed felon, makes the killing excusable homicide.' Whart. on Hom. section 533; Desty's Amer. Crim. Law, sections 125d, 126d.

"But 'to justify the defensive destruction of human life the danger must be not problematical and remote, but evident and immediate.' *Aldrich v. Wright*, 53 N. H. 398 [16 Am. Rep. 339]. 'The attempt must not be merely suspected, but (reasonably) apparent; the danger must be (apparently) imminent, and the opposing force or resistance must be necessary to avert the danger or defeat the attempt.' \* \* \* 'The law holds the life of man in the highest regard. And only in extreme instances of wrongdoing, and impelled by an extreme necessity, can another take it innocently away.'"

In Kerr, Law of Homicide, at section 185, the law is tersely and correctly stated in the following words:

"Homicide in defense of property is excusable when necessary to defeat or prevent the commission of a forcible or atrocious felony thereon, but under no other circumstance."

In *Driggers v. United States*, 7 Ind. T. 761, 104 S. W. 1169, the court charged the jury as follows:

"The jury are instructed that justifiable homicide is the killing of a human being in self-defense, or in the defense of habitation, property, or person, against one who manifestly intends or endeavors by violence or surprise to commit a felony on either. A bare fear of any of these offenses is not sufficient to justify the killing. It must appear that the circumstances, viewed from the defendant's standpoint, as they reasonably appear to him, were sufficient to excite the fears of a reasonable man, and that the defendant acted upon these reasonable appearances of danger."

That instruction, it was held by the court, stated the law correctly under a statute precisely like ours. Take the defendant's own testimony in this case: Where is there the slightest evidence of force or violence exerted by the boy which would excite fear in any reasonable man? Again, in what way was there any surprise? The defendant was not, and could not have been, surprised so as to excite fear in him. He was actually standing guard with a loaded gun. If any one was surprised in this case, it was the little boy who was shot. The law is not that the owner may shoot an offender merely because the owner discovers the latter in the act of taking the former's property. Unless there is some act of violence or surprise accompanying the act, which gives the

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owner reasonable cause to fear personal injury, he may not shoot the offender. If the owner of property may ruthlessly kill the offender merely because the latter is found stealing property, when neither force nor violence is used so as to cause or justify fear in the owner of the property, then such owner may kill any one on sight whom he suspects of intending to take—that is, to steal—his property. Such in my judgment, is not the law, and the jury should be so instructed in plain language. Nor do I think that the question of whether the little boy was committing a burglary by what he did is here for review. The court in its instructions merely assumed that the boxes placed upon one another as described in the evidence and in which the rabbits were kept constituted an outhouse or a building within the purview of our statute. The state saved no exception to the court's charge and has assigned no error in that regard. The instruction of the court, right or wrong, therefore, constituted the law of this case so far as the jury were concerned. While I am not prepared to say that the rabbit boxes placed as they were did or did not constitute an outhouse or building within the purview of our statute, yet, that question not being before us, I express no opinion upon it.

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### COTTAM v. OREGON SHORT LINE R. CO.

No. 3355. Decided December 3, 1919. (187 Pac. 827.)

1. EVIDENCE—WITNESSES COMPETENT TO TESTIFY REGARDING VALUE OF AUTOMOBILE. Witnesses with experience in repairing and dealing in secondhand automobiles, and some of whom had previously negotiated with plaintiff with a view to buying his machine, held competent to testify regarding the value of plaintiff's automobile. (Page 333.)
2. RAILROADS—FAILURE TO LOOK NOT CAUSE OF CROSSING ACCIDENT. Where plaintiff's automobile, stalled on the tracks by reason of a defective crossing, was struck by an engine driven without lookout, his failure to look and listen before going on the track cannot be held to have been the cause of the injury. (Page 334.)
3. RAILROADS—DUTY TO LOOK AND LISTEN RECIPROCAL. Person

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operating a railroad engine and an automobile driver attempting to use a railroad crossing have a reciprocal duty to look and listen.<sup>1</sup> (Page 334.)

Appeal from District Court, First District, Box Elder County; *J. D. Call*, Judge.

Action by James Cottam against the Oregon Short Line Railroad Company.

Judgment for plaintiff, and defendant appeals.

**AFFIRMED.**

*Geo. H. Smith, J. V. Lyle, and R. B. Porter*, all of Salt Lake City, for appellant.

*Wedgwood, Irvine & Thurman*, of Salt Lake City, for respondent.

**GIDEON, J.**

Plaintiff seeks by this action to recover damages for an injury to an automobile alleged to have been caused by the negligence of defendant. The acts of negligence claimed were: A defective crossing, failure on the part of the operators of defendant's cars to keep any lookout in approaching a crossing, and negligently permitting the engine to approach such crossing at a dangerous and reckless speed without having the same under proper or any control. The defendant denied the negligence and pleaded affirmatively contributory negligence on the part of plaintiff. The jury returned a verdict in favor of plaintiff. Defendant appeals.

Errors are assigned respecting the admission of testimony,

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<sup>1</sup> *Olsen v. O. S. L. & U. N. Ry. Co.*, 9 Utah, 129, 83 Pac. 623; *Wilkinson v. O. S. L. R. Co.*, 35 Utah, 110, 99 Pac. 466; *Malizia v. O. S. L. R. Co.*, 178 Pac. 756; *Shortino v. S. L. & U. Ry. Co.*, 174 Pac. 860.

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the giving of certain instructions, and the refusal to give other instructions requested.

The accident occurred in a street crossing in Brigham City, Box Elder county, this state. It appears that the tracks of defendant's railroad intersect at right angles Forest street, a street running west from the center of said city to its western limits and continuing thence on as a highway to numerous smaller towns and a large farming community in the northern and western part of that county. The street in question is used, not only by the people of Brigham City in going to and from the passenger depot, but by the residents of the smaller towns and the farming community in coming to Brigham City and in traveling from that city to the larger centers of population located south of Brigham City. The passenger depot of the defendant company is located just east of the main track and south of Forest street, and east of said depot some thirty or forty feet is located another track, referred to in the record as the "house track." The accident happened on the last-named track at the place where Forest street crosses that track. The freight depot of defendant is located some distance north of the street in question on the house track. The switchyard of defendant company is north of Forest street and west of the freight depot. The so-called house track is used for loading and unloading freight and is connected with the main track by a line running diagonally in a southeasterly and northwesterly direction. This connecting line comes into the house track some forty or fifty feet north of the center of Forest street, the place of the accident. It also appears that there is a gradual slope westward from the main street of Brigham City for a distance of some four city blocks leading to the tracks of the defendant company. At the time plaintiff approached defendant's railroad, a passenger train was standing on the main track directly across Forest street. The distance from that track to the house track on that street is approximately sixty-five feet. On the morning of the accident, the plaintiff, in driving westward, disconnected the clutch of his automobile and permitted the machine to coast onto the track known as the house track. It is

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claimed by plaintiff, and was so testified to by him, that by reason of a depression between the rails of this track the automobile stopped; that at that time he ascertained for the first time that the engine of his automobile was not operating; that after attempting to start the engine of the automobile by what is designated as a "self-starter," and which failed to respond, he got out of the automobile and attempted to push it off the track; that he was unable to do so. He testified that at about the time he reached the track he observed an engine attached to two cars coming from the main track toward the house track a distance of some 200 feet away; that the engineer of the approaching engine was sitting with his back toward the crossing and was looking in a northerly direction, and not observing whether any one was or was not on the track where it crosses Forest street; that, upon observing that the engineer was not looking in his direction, plaintiff attempted to give an alarm by loud calls; that the engine was within a few feet before the engineer turned around and observed the automobile on the track and after it was too late to stop the advance of the engine; that as a result it struck and damaged the automobile. It is true that the testimony of the engineer and his fireman is to a different state of facts. According to the testimony of the engineer, he approached this crossing on the house track from beyond the freight depot, and everything possible was done to stop the engine before it reached the place of the accident. That testimony presents a question of fact, and the jury having determined it adversely to the appellant, this court is not authorized to review the findings of the jury.

Some two or three witnesses testified on behalf of the plaintiff as to the value of the automobile at the time of the accident and after it was damaged. Those witnesses 1 were called and testified as experts. The error claimed is that it was not shown that they were familiar with the value of automobiles such as plaintiff's, or that they were familiar with its condition at that particular time, and therefore ought not to have been permitted to testify as to its value. The witnesses, without exception, had been engaged in and had

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had some experience with automobiles both in repairing and in dealing in secondhand automobiles. One or two of the witnesses so testifying had known this particular automobile and in the month of August of that year had had some negotiations with the plaintiff with a view of buying it. The weight of such testimony was a matter for the jury to consider and determine. The court did not err in overruling defendant's objection to that testimony.

It is strenuously insisted that, under the facts shown, it conclusively appears that the plaintiff was guilty of negligence on his part which caused the injury; that if he had looked and listened there was nothing to prevent him from seeing the approaching train, and, having failed to do so, he ought not be permitted to recover. The negligence claimed by the plaintiff is: First, that by reason of the defective crossing or depression between the rails of defendant's track he was prevented from crossing that track to the space between it and the main track; and, second, the defendant did not have its engine under control as it approached the crossing by reason of the fact that the operators failed to keep any lookout to see the condition of the track at the street crossing. It is insisted that by reason of these acts of negligence the injury resulted. Manifestly, nothing that the plaintiff could have done by looking and listening to see whether trains were approaching would have brought the depression in the track to his notice or cause him to anticipate that the engineer in charge of the engine would negligently drive his engine upon the crossing without keeping a proper lookout to see whether the way was clear. The jury were told in the court's ninth instruction that it was the duty of the plaintiff, in approaching the crossings and the track, to look and listen and to observe whether there was any train approaching, and that if he failed to do that, and an injury resulted from 2, 3 such failure on his part, he was not entitled to recover. The jury were also instructed that it was likewise the duty of the employes of defendant company in approaching a crossing such as this was, to observe and keep a lookout as to whether there was any obstruction. That reciprocal duty on the part

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of the plaintiff and defendant has been so repeatedly announced as the rule of conduct necessary by the operators of trains as well as people attempting to cross tracks that it may be said to have become elementary. *Olsen v. O. S. L. & U. N. Ry. Co.*, 9 Utah, 129, 33 Pac. 623; *Wilkinson v. O. S. L. R. Co.*, 35 Utah, 110, 99 Pac. 466; *Malizia v. O. S. L. R. Co.*, 53 Utah, 122, 178 Pac. 756; *Shortino v. S. L. & U. Ry. Co.*, 52 Utah, 476, 174 Pac. 860.

There is nothing in the record to bring this case within the principle laid down in the Shortino Case, *supra*. On the contrary, the plaintiff's testimony is to the effect that, if the automobile had not been stopped by the defect in the track, there was ample time for him to have gotten safely across, and also that, if the defendant had kept a proper lookout, the operators of the engine could have stopped the same before reaching the place of the accident.

The theory of the defense was fairly submitted to the jury, and, the jury having determined the facts upon disputed testimony, this court is powerless to review its findings.

There is no prejudicial error in the record.

The judgment is accordingly affirmed, with costs.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

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GROESBECK v. LAKE SIDE PRINTING CO.

No. 3362. Decided December 3, 1919. (186 Pac. 103.)

1. **APPEAL AND ERROR—EVIDENCE CONSIDERED FAVORABLY TO PLAINTIFF ON REVIEW OF JUDGMENT ON DIRECTED VERDICT.** On plaintiff's appeal from judgment for defendant on directed verdict, the Supreme Court will consider and apply the evidence in the light most favorable to plaintiff's cause of action. (Page 338.)
2. **MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE OF INEXPERIENCED JOB PRESS FEEDER FOR JURY.** Whether inexperienced fourteen year old job press feeder operating a "rocker tail" job press was contributorily negligent in placing his hands between the upper edge of the rocker tail and the crank shaft, for purpose of rescuing a slip which had been printed and which he

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had been instructed not to spoil or lose, *held* for the jury under the evidence. (Page 342.)

3. **MASTER AND SERVANT—APPRECIATION OF DANGER BY MINOR EMPLOYÉ JURY QUESTION.** Where it is not clear from all the facts and circumstances, including the age and experience of minor employé, whether he ought to have known and appreciated the danger of the work he was doing, the question of whether he did appreciate the danger is one of fact for the jury and not of law for the court. (Page 342.)
4. **EVIDENCE—JUDICIAL NOTICE.** It is a matter of common knowledge that it is lack of judgment, rather than want of knowledge, which minimizes both fear and caution in the young and inexperienced mind. (Page 342.)
5. **MASTER AND SERVANT—NEGLIGENCE OF MINOR EMPLOYÉ PRECLUDES RECOVERY FOR INJURIES.** The law does not permit a minor servant to escape the consequence of his own negligence, where it is clear that he did know and appreciate, or must have known and appreciated, the danger. (Page 343.)
6. **MASTER AND SERVANT—NEGLIGENCE IN FAILING TO WARN YOUTHFUL INEXPERIENCED EMPLOYÉ JURY QUESTION.** In action for injuries to inexperienced fourteen year old job press feeder, where there was evidence that both acting foreman, who employed him, and the general foreman, observed that he was not an experienced or skilled press feeder, whether it was negligence not to instruct or warn him as to the danger of the work *held* for jury.<sup>1</sup> (Page 344.)
7. **MASTER AND SERVANT—EMPLOYER MUST WARN MINOR OPERATING MACHINERY.** Owners of machinery, who employ minors to operate the machinery, must see to it that the minors are properly instructed and cautioned with respect to all the dangers that are necessarily incident to the operation of such machinery. (Page 344.)

Appeal from District Court, Third District, Salt Lake County; *R. S. Porter*, Judge.

Action by Percy Groesbeck against the Lake Side Printing Company.

Judgment for defendant, and plaintiff appeals.

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<sup>1</sup> *Stam v. Ogden Packing & Provision Co.*, 53 Utah, 248, 177 Pac. 218.



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REVERSED and REMANDED, with directions.

*Morgan & Huffaker and M. L. Ritche*, all of Salt Lake City, for appellant.

*Stewart, Stewart & Alexander*, of Salt Lake City, for respondent.

FRICK, J.

The plaintiff, a minor, by his guardian ad litem, brought this action against the defendant, a corporation, in the district court of Salt Lake county, to recover damages for personal injuries. The district court directed a verdict for the defendant, from which the plaintiff appeals.

The plaintiff, in his complaint, in substance alleged that he is a minor of the age of fourteen years; that the defendant is a corporation, and at the time of the injury complained of he was in its employ; that some time after he entered the employ of the defendant, the date being stated in the complaint, he was directed to work at a job press and directed to print numbered memoranda slips and was directed not to lose any "as they were numbered in a series"; that when he entered said employment the plaintiff "was entirely inexperienced in the use of machinery and ignorant of the danger surrounding the use of said machine (said job press)"; that the defendant failed to instruct the plaintiff as to the proper manner of operating said job press and failed to warn him of the dangers incident to its operation; and that defendant negligently directed him to operate said job press without explaining the dangers to which one inexperienced in operating the same would be exposed, etc.; "that while operating said machine or press one of said memoranda slipped from plaintiff's hand and fell to the interior of said press machine," and plaintiff, in attempting to take said memorandum slip from said press, got his fingers "caught in said machine and crushed," etc. After alleging that plaintiff was paid one dollar per day for his services, and making other necessary allegations respecting

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the injury and damages, plaintiff prayed judgment.

Defendant, in its answer, admitted the allegations respecting employment, the age of the plaintiff, and that he was earning one dollar per day, and denied all the alleged negligence on the part of the defendant. The defendant, with great particularity and detail, described the job press and how it was operated and how the injury to plaintiff occurred. As an affirmative defense, it alleged that whatever danger there was in operating said job press was open and obvious to any one; that plaintiff knew and appreciated the danger, and "whatever injuries that the said plaintiff suffered were received on account of plaintiff's gross carelessness and contributory negligence."

After the plaintiff had produced his evidence in support of the allegations of his complaint, and rested, the defendant moved the court for a directed verdict. The court granted the motion and directed the jury to return a verdict in favor of the defendant. The court based its ruling upon two grounds: (1) That under the evidence adduced by the plaintiff the defendant was not guilty of negligence in failing to instruct or warn him in operating the job press; and (2) that whatever danger there was in operating said job press was open and visible to the plaintiff, and that he must have seen it in attempting to rescue the memorandum slip from the press, and was therefore guilty of negligence as matter of law.

It is impractical to set forth the evidence within the limits of an opinion. Moreover, in view that we feel constrained to reverse the judgment upon the ground that 1 the evidence was sufficient to take the case to the jury, and for that reason a new trial must be granted, we shall refrain as much as possible from discussing the effect of the evidence. We shall therefore, as briefly as possible, merely refer to the substance of the evidence relating to the controlling facts. In that connection it must be kept in mind, however, that in view that the court disposed of the case on defendant's motion the evidence must be considered and applied most favorable to the plaintiff's cause of action.

The evidence, without conflict, shows that when plaintiff

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was employed by the defendant he was fourteen years and four months of age; that for some time preceding that time, and while he was attending school, he had intermittently and irregularly been engaged in what is called "feeding" a job press for one Coniff; that his experience was quite limited, indeed he had only been feeding what he called cards or heavy paper on Mr. Coniff's job press; that after school closed for the season he was desirous of obtaining something to do in some printing establishment, and with that end in view was passing up Main street in Salt Lake City when he noticed a sign in defendant's window that it wanted a "press feeder"; that he went into the office of the defendant and applied for the position; that the man in charge of the office to whom he applied sent him downstairs; that he went downstairs as he was directed; that the man, who was acting as foreman of the press room on account of the regular foreman's absence on his vacation, merely asked plaintiff where he had worked; that plaintiff told him where he had worked, and the man in charge then asked whether Mr. Coniff still operated the establishment referred to by the plaintiff. The plaintiff told the acting foreman that he did, and the foreman asked him whether he had been feeding a job press for Coniff, and plaintiff told him that he had done so some times. The acting foreman said he was exceedingly busy and that he was short two men and needed help. The acting foreman also testified as a witness for the plaintiff that he did not stop to examine into plaintiff's ability or experience to operate the job press, but set him to work, and that he watched him for a little while; that he set him to work on a machine like the one Mr. Coniff had and noticed that, while plaintiff was not a skilled or experienced "feeder," yet he got along with the work for about two weeks or a little longer, when the foreman of the establishment returned. The foreman also testified for the plaintiff and said that he noticed the plaintiff and in referring to what he observed about him said: "He impressed me as having little experience in feeding presses." The plaintiff was, however, directed to feed certain "sales slips" on the job press. This he did on the afternoon before the day of the injury,

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and it was observed that he was not getting along first rate with that work, so he was directed to work on another press. On the following day, however, it seems, he was again placed back to feed the sales slips. These slips were printed on thin paper, to which plaintiff said he was unused, and were serially numbered. He was directed by the foreman not to lose or spoil any of the slips, since if that occurred it would spoil "the book," as the witness termed it.

The evidence shows that the defendant operated two kinds of job presses. One kind had a mechanism which, by the witnesses, is called a "rocker" or "rocker tail," which was in front of the feeder but below the printing mechanism, while the other machine did not have such a mechanism. It seems that, in case the paper or card on which printing was to be done slipped from the guides after it was placed therein by the feeder, it would fall upon this rocker tail in the one kind of press and in the other, which did not have the rocker tail, the paper or card would fall to the floor. It also appears that, while the plaintiff had operated or had been feeding both kinds of presses, he had operated or fed the kind without the rocker tail most, or about two-thirds, of the time that he was in defendant's employ. His testimony, which we must assume to be true, leaves no room for doubt that he did not clearly understand the operation of the so-called "rocker tail," which, it seems, was used as a device to balance other parts of the machinery and was so constructed that when the press was in use it would rise and fall and in doing so would close tight up against the crank shaft which passed horizontally in front of the feeder or operator but below the feeding mechanism. It further appears that in feeding the slips the plaintiff had experienced some trouble, in that some of them would fall on the floor or otherwise get soiled. It also appeared that one of the slips fell upon this so-called "rocker tail," and when the plaintiff noticed it lying there he, without stopping the machine, which he might have done, attempted to "grab" it, as he says, from the rocker tail, and in doing that his fingers were caught between the shaft aforesaid and the upper edge of the rocker tail and injured, so that all four

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fingers of his right hand had to be amputated at or near the second joint. The plaintiff, in testifying, clearly indicated, when all of his testimony is considered, that he did not notice the operation of the rocker tail and apparently was not aware that it rose and fell and in doing so would close up tightly against the crank shaft as before stated.

Defendant's counsel insist, and it seems the district court so held, that the movements of the rocker tail were apparent to any one, and that the plaintiff, the same as any one else, was bound to know that, if he placed his hand or fingers between the upper edge of the rocker tail and the shaft aforesaid, they would be injured or crushed. Much time and effort were spent in cross-examining the plaintiff to make him admit that he could see the movements of the mechanism, including the rocker tail, and that he knew what the consequences would be if he got his fingers between the rocker tail and the shaft aforesaid. The plaintiff, it seems to us, in describing how the accident occurred, was very frank. From a consideration of all of his testimony, however, which we shall not pause to repeat here, it is, to say the least, not so clear that a court can say as matter of law that in view of his age and lack of experience and skill he necessarily should have appreciated the danger of attempting to rescue the slip when he saw it lying upon the rocker tail as before stated. The plaintiff frankly admitted, what is but natural, that he desired to avoid the loss of any of the slips which were consecutively numbered. It also appeared that he did not fully succeed, and in view of that became quite concerned or anxious to spoil or to lose as few of the numbered slips as possible, and that he was afraid that if he stopped the machine too frequently or lost or spoiled too many slips he would be "fired," as he puts it, or lose his position. It is quite true, as suggested by defendant's counsel, that the question is not what did the plaintiff actually see, know, or appreciate, but that the question is, what, in view of all the circumstances and his ability to see and appreciate, should he have known and appreciated? It is, however, also true that in case of a minor, unless from all of the facts and circumstances, including the age and ex-

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perience of such minor, it is clear that he ought to have known and appreciated the danger, the question of whether he did so or not is one of fact and must be determined by a jury as such and not one of law to be determined by the court as a matter of law. It is clear that both the judge who granted the motion for a directed verdict and the one who subsequently passed upon the motion for a new trial were confident that whatever danger there was in operating the job press was so open and obvious that a child must have seen and appreciated it. The job press was brought into court during the trial, and the manner of operating it in feeding the slips was illustrated to both the court and the jury. If the jury had found the facts against the plaintiff, there would be no escape from their conclusion; but it is not so clear that a court had a right to pass upon the facts against the plaintiff as a matter of law. No doubt both judges were impressed with what they saw demonstrated in their presence. The judges, however, saw only through their own eyes and arrived at their conclusions from the exercise of their mature judgments. It is a matter of such common knowledge that courts, as well as others, are bound to keep it constantly in mind, that it is the lack of judgment rather than the want of knowledge which minimizes both fear and caution in the young and inexperienced mind. While it well may be said that it is just as palpable to a child that it will suffer injury if it jumps out of an open window from an upper story of a building as it is to an adult, yet if the question is one of rescuing some object which is about to fall or is falling out of the open window it is the immature in mind and judgment that will take the greater risk in rescuing the falling object because of their lack of experience and want of mature judgment. It is for that reason that both humanity and the wisdom of the law require that in case a minor is injured—and this is especially true in operating machinery—when the contention is made that the injury is the result of his own negligence, that question, except in rare cases, must be submitted to a jury to be determined as a question of fact and

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cannot be determined by a court as a question of law. While the law does not permit a minor to escape the consequences of his own negligence where it is clear that he did know and appreciate, or must have known and appreciated, the danger, yet whether he did or did not know, and, if he 5 knew, whether he appreciated the danger, except in very clear cases, should be determined from all the facts and circumstances in each case. Injustice is far more likely to result from attempting to dispose of such intricate questions of fact by the court as a matter of law, than from submitting the evidence to a jury of men engaged in different callings and with a wide experience, under proper instructions respecting the law. The question of whether the immature mind should be required to suffer the consequences of his acts in view of a particular train of circumstances always presents a more or less delicate question which should not be too hastily determined by a court as a matter of law.

The district court, however, also ruled that defendant was not negligent in failing to instruct or to warn the plaintiff of the danger to which he might be exposed in feeding the presses. In passing upon that question the court said:

"A person making application for any particular job is presumed to know how to do that job."

This was predicated upon the statement that the plaintiff had made application for the job of press feeder. The court, it seems, overlooked the fact that both the acting as well as the general foreman testified that they at once observed that the plaintiff was not an experienced or skilled press feeder. The presumption referred to, if it exists at all in the case of a minor, a question we do not decide, was thus modified if not entirely overcome by what those two witnesses said they observed concerning the plaintiff's skill and ability.

In view of this, we are of the opinion that whether, under all the circumstances, it was negligence not to instruct or to warn the plaintiff, was also a question of fact for the jury and not one of law for the court. Let it be remembered that, if the owners of machinery shall employ minors to operate it, such owners must see to it that the minors are properly in-

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structed and cautioned with respect to all the dangers that are necessarily incident to the operation of such machinery. To do that places no hardship upon the owners of machinery and merely effectuates the humane purposes 6, 7 and wisdom of the law. Upon that subject the law is so admirably stated by the Supreme Court of California, in the case of *Foley v. California Horseshoe Co.*, 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87, that we take the liberty of quoting somewhat copiously from the opinion in that case and adopting it as reflecting our own views upon the subject:

"Were the employé in this case an adult, the rule might well be different; but the very reason why an adult under these circumstances would be held to have taken the risk while screwing on the nut serves to show the injustice and hardship which would result if it were sought to be applied to a minor. The question of the taking of a risk, the question of the assumption of responsibility in a given act, is determined as much upon the matter of judgment as upon the matter of knowledge. An adult employé, when the facts are known to him, is presumed in law to exercise the same judgment \* \* \* as would the employer. The employer's duty is fulfilled, and he is not negligent, if he puts the employé in full possession of the facts, and makes him acquainted with the attendant dangers and risks. \* \* \* The conduct of the child, however, is and should be viewed and measured by a different rule. \* \* \* Knowledge he may have; facts he may acquire; but the ability to apply his knowledge or to reason upon his facts comes to him later in life. \* \* \* It would be barbarous to hold him to the same accountability as is held the adult employé, who is an independent free agent. Their conduct is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act. And it must, from the nature of the case, be a question of fact for the jury, rather than of law for the court, to say whether or not, in the performance of a given task, the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability. This must necessarily give rise to a different rule from that so well established, which measures the conduct of the adult by that which might be expected of the ordinarily prudent person placed in the same position."

The foregoing language was approved and adopted by the same court in the case of *O'Connor v. Golden Gate, etc., Co.*, 135 Cal. 537, 544, 67 Pac. 966, 969 (87 Am. St. Rep. 127).



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To the same effect are the following cases: *Mansfield v. Eagle Box, etc., Co.*, 136 Cal. 622, 69 Pac. 425; *Kaillen v. Northwestern Bedding Co.*, 46 Minn. 187, 48 N. W. 779, and *Kuphal v. Western Mont. Flouring Co.*, 43 Mont. 18, 114 Pac. 122.

In *Mansfield v. Eagle Box, etc., Co.*, supra, it is said:

"Common prudence demanded that this inexperienced young man, commanded to work with a dangerous machine, with which he was not at all familiar, should have been fully and specifically instructed in the safest methods of doing this work. To put them to work without these instructions was negligence, and the jury, could well have concluded from the facts in evidence that plaintiff's crippled hand was the proximate result of such negligence."

Lest we be misunderstood, we desire to state that we do not contend that the facts in the case at bar are parallel with the facts in the case just quoted from. Nor do we hold as a matter of law that it was the duty of the defendant to instruct or warn the plaintiff, but what we do hold is that the evidence is such that the question of defendant's negligence in that regard, as well as the question of contributory negligence on the part of the plaintiff, should have been submitted to the jury to pass on, and that the district court erred in deciding those questions as questions of law. We have therefore quoted from the last California case only for the purpose of illustrating the general views of the courts.

The case of *Kaillen v. Northwestern Bedding Co.*, supra, is as nearly a parallel case to the one at bar as it well could be. In the first headnote, which correctly reflects the decision, it is said:

"Whether it was negligence on the part of defendant to put the plaintiff to work on a certain machine without informing him as to the dangers incident to operating it, or whether the plaintiff ought, in the exercise of ordinary prudence, to have fully understood these dangers without being told of them, was, under the evidence in this case, a question for the jury."

It is not necessary to pursue the subject further.

Defendant's counsel have referred us to the following cases which they contend support their contention that the district court was right in withdrawing the case from the jury, namely: *Mithen v. Jeffery*, 259 Ill. 372, 102 N. E. 778; *Der-*

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*ringer v. Tatley*, 34 N. D. 43, 157 N. W. 811, L. R. A. 1917F, 187; and *Silvia v. Sagamore Mfg. Co.*, 177 Mass. 476, 59 N. E. 73. Without pausing to review those cases, it must suffice to say that in some aspects they are clearly distinguishable from the case at bar and from those cited above in support of plaintiff's contentions.

We remark, there is nothing in any of the cases referred to by counsel which emanate from this court which in any way is contrary to the doctrine laid down in the cases we have quoted from. As the latest expression of this court, we refer to *Stam v. Ogden Packing, etc., Co.*, 53 Utah 248, 177 Pac. 218.

In conclusion, we desire to add that counsel for both sides deserve our commendation in citing only such cases as they deemed actually supported their respective views. Usually counsel cite a large list of cases and place the burden upon us to examine all of them and determine which are and which are not in point. It should always be remembered by counsel that it is rare when two cases are precisely parallel. As a rule each case presents some feature not present in any other, and hence all that can be accomplished by the citation of cases is to illustrate the controlling principles. That may just as well be accomplished (and generally is more effectively done) by the citation of a few well-considered cases as by citing a large number of analogous ones.

For the reasons stated, the judgment is reversed, and the cause is remanded to the district court of Salt Lake county, with directions to grant a new trial and to proceed with the case in accordance with the views herein expressed. Plaintiff to recover costs on appeal.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

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Appeal from Seventh District.

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## ARMSTRONG v. LARSEN.

No. 3378. Decided December 3, 1919. (186 Pac. 97.)

1. **CONTRACTS—NECESSITY OF INSTRUCTIONS AS TO RIGHTS OF PARTIES UNDER UNAMBIGUOUS CONTRACT.** Where the terms of a written contract sued upon are neither ambiguous nor uncertain, it is the duty of the court to construe the contract and to advise the jury of the respective rights of the parties thereunder. (Page 350.)
2. **APPEAL AND ERROR—REFUSAL OF INSTRUCTIONS EXPLAINING UNAMBIGUOUS CONTRACT PREJUDICIAL ERROR.** In an action for breach of a contract to deliver lambs sold, where defendant claimed that the agreement required only wether lambs born of his herd to be delivered, which requirement did not appear in contract, it was prejudicial error to refuse to instruct, as requested, that contract was not so limited.<sup>1</sup> (Page 350.)
3. **TRIAL—ERROR IN REFUSING INSTRUCTION NOT CURED BY INSTRUCTION GIVEN.** In an action for breach of a contract to deliver lambs where defendant claimed that only wether lambs raised from his own herd were to be included, refusal of an instruction that the contract did not contain such a limitation *held* not cured by another instruction merely to the effect that the breach of the contract gave rise to a cause of action for damages; such instruction being in no sense an interpretation of the legal rights of the parties.<sup>2</sup> (Page 351.)
4. **EVIDENCE—ENTIRE CONVERSATION RELATING TO ACCORD AND SATISFACTION ADMISSIBLE.** In an action for breach of a contract to deliver lambs sold, wherein defendant alleged the making of a subsequent contract that only wether lambs born of his own herd were to be delivered, it was error to refuse to admit the entire conversation relating to such subsequent agreement, since if it had existed it would have been one of accord and satisfaction. (Page 351.)
5. **TRIAL—INSTRUCTION SUBMITTING ISSUE OF BREACH OF CONTRACT, NOT APPLICABLE TO ISSUE, ERROR.** In an action for breach of a contract to deliver lambs, where defendant while admitting the breach claimed the subsequent contract provided merely for the delivery of wether lambs born of his own herd, instructions submitting the issue of breach to the jury *held* erroneous. (Page 353.)

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<sup>1</sup> Citing *Bank v. Peterson*, 33 Utah, 209, 93 Pac. 566, 126 Am. St. Rep. 817.

<sup>2</sup> *Batley v. Spalding-Livingston Co.*, 43 Utah, 535, 136 Pac. 962,

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Appeal from Seventh District Court, Sanpete County;  
*George Christensen*, Judge.

Action by John Armstrong against James Larsen.

Judgment for defendant, and plaintiff appeals.

REVERSED and REMANDED, with instructions.

*Dilworth Woolley*, of Manti, for appellant.

*James W. Cherry*, of Mt. Pleasant, for respondent.

GIDEON, J.

This is an action for breach of contract. On March 12, 1917, plaintiff and defendant entered into the following written agreement:

"This contract between James Larson of Mt. Pleasant, Utah, and John Armstrong of Ephraim, Utah, the said James Larsen agrees to sell 1,000 lambs to John Armstrong and deliver them on his farm in Pigeon Hollow October 5th, or 6th, 1917, for ten cents per pound, said lambs to be weighed up dry with dry fleeces after twelve hours stand in dry corral; all body wrinkles, scrubs, beaters, lame and sick cut back; said lambs to be dipped if there is dipping order and to pass inspection at time of delivery; said James Larsen hereby acknowledges receipt of fifty cents per head as part payment; that balance of purchase price to be paid at time of delivery."

The foregoing contract is alleged in the complaint; also, the delivery of 511 of the 1,000 lambs. Damage is claimed for failure to deliver the full number specified.

The answer admits entering into the written contract, but alleges:

"That in addition thereto the said parties expressly agreed that the number and kind of lambs agreed to be sold and delivered was restricted and limited to the male wether lambs to be born to the herd or band of sheep then owned by defendant. Defendant alleges that the number of male wether lambs theretofore born of that herd or band of sheep owned by him at the date of said agreement amounted to 511 head, and no more, all of which were delivered to said plaintiff pursuant to said agreement."

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As a further defense, it is alleged that at the date of delivery of the 511 lambs defendant agreed to deliver an additional 100 lambs not included in the contract at the price of ten cents per pound, and that plaintiff accepted such additional lambs in full satisfaction of defendant's obligations under said agreement.

In his reply plaintiff admitted the receipt of ninety-one lambs in addition to the 511, but denied that the same were received in discharge or release of the defendant from the obligations of the written contract.

All that part of defendant's answer alleging that an agreement was made by the parties to the effect that the terms of the contract were restricted to either lambs born to the herd of defendant or to wether lambs was stricken out on motion of plaintiff as "sham and irrelevant." On the issues then remaining the case went to trial. The jury returned a verdict in favor of the defendant. Plaintiff appeals.

The admission of testimony over plaintiff's objections, the giving of certain instructions, and the refusal to give other instructions as requested by plaintiff, are assigned as error.

The status of the pleadings left only two questions for the jury to determine: (1) Did the plaintiff and defendant agree that the delivery and acceptance of the additional ninety-one lambs at the price of 10 cents per pound should be in full satisfaction of defendant's obligations under the contract? (2) If such lambs were not so accepted, what amount of damages, if any, was the plaintiff entitled to recover? If the jury determined the first question in favor of defendant, it was not necessary to consider and determine the second.

The court was evidently of the opinion that by the terms of the contract the defendant was not entitled to limit or vary the written agreement by showing that only wether lambs and such wether lambs as were born of defendant's herd were intended to be included in the contract. The defendant testified, however, in repeating the alleged conversations between plaintiff and defendant at the date of the delivery of the 511 lambs, and in answer to the statement made by the plaintiff, that he (plaintiff) could buy the number of lambs not de-

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livered as fixed by the contract and make the defendant pay the difference:

"You can do as you like about that, and then I says you are not entitled to this kind of lambs; you are not entitled to anything but wether lambs."

In answer to the further question, "Was there anything said about what he was entitled to do?" the witness replied, "I said that he wasn't entitled to anything but fat wether lambs." The same thought was afterwards repeatedly re-affirmed in the testimony of the same witness. This and other similar testimony by the defendant and his witnesses must have tended to impress the jury that it was the intent of the parties at the time of making the contract that only wether lambs from the herd of the defendant were included in the contract and that the defendant was not obligated to deliver any other or additional lambs. Much of this testimony was admitted without objection, but at the close of the case the plaintiff requested the court to give the following instruction:

"You are instructed that the contract in this case specifies 1,000 head of lambs and that it does not limit the lambs which Larsen agreed to sell to the wether lambs of Larsen's herd; but that the term '1,000 lambs' means simply 1,000 young sheep, which may be ewe lambs or wether lambs or may be made up of both ewe lambs and wether lambs. Neither does the contract apply only to the lambs of Larsen's herd; the only limitations in the contract being that the lambs of the kind therein mentioned, to wit, the sick, the cripples, those with body-wrinkles, and beaters, which are the motherless lambs, should be cut back or taken out of the herd before delivery to the buyer."

The refusal of the court to give this instruction is assigned as error.

The terms of the written contract are neither ambiguous nor uncertain. It was therefore the duty of the court to construe the contract and advise the jury of the respective rights of the parties thereunder. The request embodied a correct interpretation of the contract. It was the duty of the court to give that or similar instruction. The failure to do so, in our judgment, constituted prejudicial error. *Bank v. Peterson*, 33 Utah, 209, 93 Pac. 566, 126 Am. St. Rep. 817; *Lowry v. Megee*, 52 Ind. 107; *Kamphouse v.*

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*Gaffner*, 73 Ill. 453; *Gage v. Meyers*, 59 Mich. 300, 26 N. W. 522.

Nor do we think the court by its sixth instruction cured the error in refusing the above request. In that instruction the jury were told that the contract was admitted; that the defendant in that contract agreed to sell and deliver to the plaintiff 1,000 lambs; that the failure or refusal on the part of the defendant to deliver lambs "of the kind described in said contract" constituted a breach of the same on the part of the defendant which at once gave rise to a cause of action in plaintiff's favor for damages. Nothing is said in that instruction that would enlighten the jury respecting the nature or kind of lambs described in the contract or what quality of lambs the defendant was obligated to deliver and the plaintiff had a right to demand. In other words, the 3 instruction was simply to the effect that the breach of the contract gave rise to a cause of action for damages and was in no sense an interpretation or definition of the legal rights and duties of the parties to the contract gathered and determined from the terms of the contract. Some additional instruction such as the one requested, interpreting and applying the provisions of the contract, should have been given. *Bailey v. Spalding-Livingston Co.*, 43 Utah, 535, 136 Pac. 962.

The new agreement of accord and satisfaction, if it existed, grew out of and was the result of the negotiations had between plaintiff and defendant at the date of delivery 4 of the 511 lambs. The making of any such agreement or adjustment is denied by plaintiff. The consummation or existence of such agreement was therefore a question of fact to be determined by the jury. The defendant was well within his rights in insisting upon having presented to the jury the entire conversations between the parties at that time relating to and which defendant claimed constituted or led up to the contract made at that time. In these conversations, as shown by the record, reference was repeatedly made to the rights of the parties under the contract and what the defendant insisted was his duty thereunder respecting the kind of lambs to be delivered by him. Such testimony constituted additional

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reasons why it was incumbent upon the court to give the requested instruction or some similar instruction embodying the same thought. Had the court by any instruction advised the jury that that particular testimony could in no way have any bearing upon or limit the rights of the plaintiff under the written contract, but that they could consider that testimony only in determining whether the alleged agreement of accord and satisfaction had been entered into, the failure to give the requested instruction might not have constituted reversible error; but, the matter having been called to the attention of the court by defendant's request, it was its duty to instruct as requested or to give some similar instruction.

Complaint is also made of certain remarks made by counsel for respondent while addressing the jury. At another trial of this cause an occasion for that line of argument is not likely to occur. For that reason no opinion is expressed as to whether or not this particular assignment of error has merit.

As this case must be reversed and a new trial had, it seems advisable that some reference be made to certain other instructions given to the jury upon which no assignments of error are predicated, and which therefore are not before this court so far as this appeal is concerned. The court, after stating the issues by reading the pleadings, proceeded to tell the jury that, the execution of the contract being admitted, one of the material issues left for the jury's determination was: Did the defendant, on or about October 8, 1917, comply with and fulfill the terms of said contract? The jury were then instructed, in the next subdivision, that if they found that the defendant did not comply with and fulfill the terms of the contract on October 8, 1917, they should then determine whether the plaintiff, for the consideration of the sale of the ninety-one additional lambs at ten cents per pound, agreed to release and discharge the defendant from all obligations under the contract. In the next subdivision of the same instruction the jury were told that if they found that the defendant did not fulfill the terms of the contract on October 8, 1917, and if they further found that the plaintiff did not agree to release the defendant by reason of the sale of the additional



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sheep, then they should determine the amount of damages, if any, the plaintiff had sustained by the breach of the contract. As indicated above, the question of the 5 breach of the contract was not in issue. It was testified by both the plaintiff and the defendant and all the other witnesses testifying upon that point that the full number of lambs mentioned in the contract had not been delivered. The breach of the contract, under the proper construction of the contract, was therefore not in issue and was not in question, and the jury had nothing to consider or find upon that issue. The other propositions included in that instruction were erroneous for the reason that they contained elements which were not necessary for the jury to consider in determining their answer to the question propounded in such subdivision or instruction.

The judgment is reversed, and the cause is remanded to the district court, with instructions to grant a new trial. Appellant to recover costs on appeal.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

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MALSTROM v. LUND.

No. 3387. Decided December 4, 1919. Rehearing denied January 2, 1920. (185 Pac. 1109.)

1. **APPEAL AND ERROR—FINDINGS SUPPORTED BY COMPETENT TESTIMONY NOT REVIEWABLE.** Where the record conclusively shows that there is substantial competent testimony to support the trial court's findings, the Supreme Court is powerless to review the record to determine the weight of the testimony. (Page 356.)
2. **GIFTS—TRUSTEE HOLDING GIFT FOR MINOR CANNOT CLAIM EXPENDITURE AT DONOR'S DIRECTION.** If a gift was completed, the money at that time became the property of donee plaintiff, then a minor, and plaintiff's grandmother, donor, had no longer control over it after placing it with defendant as trustee, and defendant cannot defeat plaintiff's claim by attempting to show

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the money was expended by him at donor's direction. (Page 356.)

3. **APPEAL AND ERROR—OBJECTION TO RECOVERY OF COSTS NOT PRESENTED IN INTERMEDIATE COURT NOT REVIEWABLE.** Where plaintiff was awarded costs upon appeal from city to district court which defendant claimed should have been awarded to defendant under Comp. Laws 1917, section 7040, and defendant did not avail himself of the right to move to retax under section 7048, the district court had no opportunity to pass upon the question, and it cannot be raised for the first time on appeal to the Supreme Court.<sup>1</sup> (Page 356.)

Appeal from District Court, Third District, Salt Lake County; *Wm. H. Bramel*, Judge.

Action by Mertie T. Malstrom against J. C. Lund, brought in the City Court of Salt Lake City.

From a judgment for plaintiff, defendant appealed to the district court, where judgment was also rendered for plaintiff, and defendant appeals.

**AFFIRMED.**

*S. P. Armstrong*, of Salt Lake City, for appellant.

*William Reger* and *Chris Mathison*, both of Salt Lake City, for respondent.

**GIDEON, J.**

Plaintiff in this action asks judgment for money claimed to have been delivered to the defendant for plaintiff by plaintiff's grandmother on or about August 6, 1902. At that date plaintiff was a minor of the age of twelve years. Defendant admits the receipt from the grandmother of the amount stated in the complaint, but alleges that he received and held such money subject to the orders of the grandmother, and that during her lifetime he paid out at her direction all but a small

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<sup>1</sup> *Smith v. Nelson*, 23 Utah, 512, 65 Pac. 485.

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amount which, after the death of the grandmother, he gave to the plaintiff. The case was tried to the court without a jury. Judgment was entered in favor of plaintiff. Defendant appeals.

It appears from the record that the defendant, Lund, is the son of the grandmother, Mrs. Taylor, and also the uncle of plaintiff, being a brother of the plaintiff's mother. The plaintiff's mother died in 1896, and the grandmother in 1915. The grandmother resided at Ephraim, Utah, and the defendant at Salt Lake City. In August, 1902, it appears there was no banking institution at Ephraim, home of the grandmother. The donor, evidently with a desire to divide part of her property among her living children and the children of the deceased daughter, sent by mail to the defendant approximately \$4,300, with directions to deposit \$1,000 of that amount to his own account, \$1,000 to a daughter, \$1,400 to another son, and \$300 each for the plaintiff and her two sisters. The letter accompanying this gift is not in the record. The defendant deposited \$300 in the name of each of the three grandchildren, including plaintiff, who were all minors, per himself as trustee, in a savings bank at Salt Lake City. The \$300 deposited in the name of the plaintiff remained in the bank, and different amounts were withdrawn, the defendant claims under the direction of the grandmother, until the date of her death in 1915, when only thirty-one dollars remained.

It is the contention of plaintiff that the money given to the defendant was a completed gift to her at the date it was delivered to defendant. The defendant contends, and so testified at the trial, that the amount was given to him to hold and to be distributed as directed by the grandmother during her lifetime, and whatever remained at her death to be given to the plaintiff.

There is one question of fact only as shown by this record: Was the \$300 sent to defendant in August, 1902, by the grandmother intended as a gift at the time to this plaintiff? The case was first tried in the city court of Salt Lake City, and that court found the facts against the defendant. Defendant appealed to the district court, and upon a hearing de novo that court also found the facts contrary to the con-

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tention of defendant. The record conclusively shows that there is substantial competent testimony to support the court's findings. This court is therefore powerless to review the record to determine the weight of the testimony. If the gift as found by the court below was a completed gift, and the amount at that time became the property of the plaintiff, the grandmother had no longer control over 1, 2 it, and defendant cannot defeat plaintiff's claim by attempting to show that the money was expended by him upon the grandmother's direction. The district court gave the defendant credit for all amounts which the plaintiff had directly received during the lifetime of the grandmother, and it seems that the plaintiff made no claim against the defendant for those items. The difficulty seems to be that the defendant, as he claims at the direction of his mother, loaned the major part of this money to a brother-in-law, and the latter has neglected to repay him the amount borrowed. While that may result in defendant having to personally pay this judgment, still that fact should not affect the plaintiff's right to recover.

The judgment against the defendant in the city court was \$499.99. On appeal to the district court judgment was entered against defendant in the sum of \$419.64. 3 Plaintiff filed a memorandum of costs in the district court, including the costs in the city court and also that in the district court. It is assigned as error that the plaintiff was awarded costs, and it is urged that under Comp. Laws Utah 1917, section 7040, the defendant should have recovered his costs on appeal for the reason that the judgment of the district court reduced the judgment of the city court in an amount greater than the costs on appeal. Defendant did not file any memorandum of costs, nor did he apply to the court for permission to do so. Neither did he see fit to avail himself of the right to move the court to retax costs, as provided by Comp. Laws Utah 1917, section 7048. The only reference in the record is a minute entry from which it appears that an oral stipulation was made by counsel as to the amount of defendant's costs in the city and district courts. The district

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court was therefore given no opportunity to pass upon the question presented by this assignment. This court, in cases like the one under consideration, will not review matters which were not presented to the district court but are raised for the first time on appeal in this court. *Smith v. Nelson*, 23 Utah, 512, 65 Pac. 485.

We find no reversible error in the record.

Judgment is **AFFIRMED**, with costs to respondent.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

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**BOARD OF EDUCATION OF SALT LAKE CITY v.  
WEST et al. (GULBRANSON, Intervener).**

No. 3371. Decided December 6, 1919. (186 Pac. 114.) Rehearing denied January 2, 1920.

1. **JURY—STATUTORY ACTION FOR USE OF SUBCONTRACTOR ONE AT LAW.** An action by board of education under Comp. Laws 1917, section 3753, for use and benefit of a subcontractor against the principal contractor and his surety, is one at law triable by jury. (Page 360.)
2. **JURY—JURY TRIAL—WAIVER.** Where an intervener in an action by board of education under Comp. Laws 1917, section 3753, for the use and benefit of a subcontractor against the principal contractor and his surety, did not demand a jury within time fixed by section 6782 for trial of the issues between himself and the general contractor, *held* that, where those issues were distinct from the rest of the case, intervener's legal right to a jury was waived.<sup>1</sup> (Page 360.)
3. **JURY—DENIAL OF JURY TRIAL AFTER FAILURE TO DEMAND NOT ABUSE OF DISCRETION.** Where intervener did not request a jury trial in accordance with Comp. Laws 1917, section 6782, so as to be entitled thereto as a matter of right, *held* that, though the trial court might have exercised its legal discretion by ordering a jury trial on intervener's application thereafter made upon his showing a satisfactory excuse for failure to

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<sup>1</sup> *Davis v. D. & R. G. R. Co.*, 45 Utah, 13, 142 Pac. 709; *Utah State Building & Loan Ass'n v. Perkins*, 53 Utah, 474, 173 Pac. 950.

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make timely application, the denial of intervenor's application for jury trial cannot be treated as an abuse of discretion, where there was no showing as to excuse for failure to make timely application.<sup>2</sup> (Page 363.)

4. **DAMAGES—PRESUMPTION OF DAMAGES TO GENERAL CONTRACTOR BY SUBCONTRACTOR'S USE OF DEFECTIVE MATERIAL.** Where a subcontractor engaged to paint a school building used defective materials which did not comply with the contract and which would not last so well as those specified, the general contractor may recover damages resulting from the subcontractor's use of defective material; there being no presumption that the school authorities would not hold the general contractor to strict accountability and require compliance with the specifications of the contract. (Page 366.)
5. **CONTRACTS—ACCEPTANCE WITHOUT KNOWLEDGE OF DEFECTS NOT EFFECTIVE TO WAIVE DEFECTS.** Where a subcontractor doing the painting on a school building, after being warned that defective materials would not be accepted, falsely assured the inspector for the school authorities that the materials used were substantially those specified in contract, any acceptance of the work based on such false representations of the subcontractor is not binding so as to prevent the general contractor, who would be required to make the deficiency good, from recovering from the subcontractor damages resulting from his failure to comply with the specifications. (Page 366.)
6. **CONTRACTS—WAIVER OF DEFECTIVE PERFORMANCE BY PART PAYMENT.** Payment by contractor to subcontractor of a sum to apply on the subcontract, made before contractor knew that materials used by subcontractor were inferior and not in substantial compliance with the specifications and contract, was not a waiver of such defects. (Page 366.)
7. **COSTS—COSTS DIVIDED WHERE ERROR IN JUDGMENT WAS ONE ONLY OF COMPUTATION.** Where the findings of fact of the district court were correct, and the only error in the judgment was one of computation, costs will on appeal be divided, though the cause was remanded, with direction to correct the error. (Page 367.)

Appeal from District Court, Third District, Salt Lake County; *H. M. Stephens*, Judge.

Action by the Board of Education of Salt Lake City against

<sup>2</sup> *Wood v. R. G. W. Ry. Co.*, 28 Utah, 351, 79 Pac. 182.

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Con West and another, in which Charles J. E. Gulbranson intervened.

From a judgment against the intervener, he appeals.

REMANDED, with directions.

*Evans & Sullivan*, of Salt Lake City, for appellant.

*Booth, Lee, Badger & Rich*, of Salt Lake City, for respondents.

CORFMAN, C. J.

Pursuant to the provisions of Comp. Laws Utah 1917, section 3753, part of a special statute (chapter 2, tit. 62), plaintiff, the board of education of Salt Lake City, commenced this action in the district court of Salt Lake county, for the use and benefit of Sullivan Plaster Block Company, against the defendant Con West, an original contractor engaged by the plaintiff to do the reconstruction work on a certain school building destroyed by fire, and his surety on bond, the defendant United States Fidelity & Guaranty Company. Numerous subcontractors, materialmen, and laborers intervened in the action as claimants against the defendants, and all of their rights were settled and finally determined by the district court with the one exception of Charles J. E. Gulbranson, the appellant here, who, as a subcontractor under West, had undertaken to do the painting of the school building. The complaint made in intervention by the aforesaid Gulbranson, hereinafter referred to as appellant, in so far as may be material here, was in substance and to the effect that, after the defendant Con West had entered into a contract with the plaintiff board of education, hereinafter referred to as the school board, and had furnished a bond pursuant to the statute, appellant furnished labor and material in painting said building amounting to and at the agreed price of \$930; that the said Con West paid to the appellant on account of said

labor and material \$700 and no more, leaving an unpaid balance due appellant of \$230, for which sum a judgment is prayed, with attorney's fees and costs. The defendant West answered, denying that there was any sum due or owing appellant, and by way of cross-complaint alleged that the appellant had failed, without defendant's knowledge, before paying the \$700 to appellant on account, to furnish certain specified materials according to specifications and contract and had used inferior materials in painting the school building, whereby and by reason whereof defendant had suffered damages to the amount of \$727.50, for which judgment was prayed. The answer of the appellant, designated a reply, was to the effect that the defendant Con West had sustained no damage; that appellant had substantially complied with his contract; that the materials furnished by him were used with knowledge on the part of both the defendant Con West and the school board; that the work had been accepted and approved, and therefore the defendants were estopped from denying the sufficiency of the quality of the materials used and the work performed. The issues thus formed under the pleadings between the defendants and the appellant were tried to the court without a jury. The court found for the defendants and entered judgment against the appellant in defendant Con West's favor for \$477.50 and costs. Appellant moved for a new trial, which motion was denied. He now appeals.

- The errors assigned and complained of by appellant are numerous, but they may be grouped for convenience and considered as submitting for determination but three questions: First. Did the district court err in denying appellant's demand for a trial by a jury? Second. Are the findings of fact sustained by the testimony and in accord with law? Third. Do the findings of the district court support the judgment? We shall consider and discuss these propositions in the order named.

The action was brought, as hereinbefore pointed out, under and in accordance with the provisions of a special statute (chapter 2, tit. 62, Comp. Laws Utah 1917). 1, 2



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The trial court held, and we think rightly so, that the action is one at law entitling a party to a jury trial when seasonably demanded in accordance with our statute, Comp. Laws Utah 1917, section 6782, which provides:

"Either party to an action of the kind enumerated in the preceding section [6781] who desires a jury trial of the same, or of any issue thereof, must demand it, either by written notice to the clerk prior to the time of setting such action for trial, or within such reasonable time thereafter as the court may order, or orally in open court at the time of such setting, and must at the same time deposit with the clerk the sum of five dollars; whereupon it shall be the duty of the court to order jurors to be in attendance at the time set for the trial of the cause. Money paid in accordance with this section shall be taxable as costs in the action. But the failure of a party who has demanded a jury to appear at the trial shall be deemed a waiver of such demand."

The constitutional provision (article 1, section 10, Const. Utah) leading up to the foregoing statutory enactment by the Legislature, in so far as may be material here, provides:

"A jury in civil cases shall be waived unless demanded."

The right to a jury trial in the present instance was denied the appellant by the trial court on the theory that appellant had waived such right. It is provided by statute (Comp. Laws Utah 1917, section 6827) that—

"All issues in civil actions shall be tried by the court, unless, in cases where a jury may be had, the same shall be demanded in the manner prescribed in section 6782 [hereinbefore quoted], or unless, in a proper case, a referee or master in chancery shall be appointed."

The question then arises: Did the defendant demand a jury in compliance with the statute, or did he otherwise waive his right to a trial by jury?

A proper determination of the question requires brief consideration as to the purposes of the special statute, section 3753, *supra*, under which the action was brought by the plaintiff. The purpose of the statute, among other things, is to enable creditors of or claimants against the contractor on public buildings to collect for work and materials furnished by them ratably and equitably from the contractor and his bondsmen in all cases to the full amount and extent of the surety bond. The right is accorded to any materialman or

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laborer to intervene in the action within a specified time after due notice given by the plaintiff and have his right or claim adjudicated in the action. The present action was begun by the filing of the plaintiff's complaint December 1, 1917. The appellant filed his complaint in intervention December 21, 1917. The answer, counterclaim, and, cross-complaint of the contractor, defendant Con West, to the appellant's complaint in intervention was filed January 14, 1918, as was also the answer of the surety defendant, United States Fidelity & Guaranty Company. Other claimants also intervened within the statutory time, among them the Sullivan Plaster Block Company, for whom a jury trial was demanded on February 8, 1918, and one accorded it by the trial court. The case was then set for trial February 9, 1918, but did not come on for hearing until June 5, 1918, when the rights of all the claimants other than the appellant had been settled and determined. The record shows that, notwithstanding the case was originally set for trial February 9, 1918, the appellant made no demand for a jury to try his case until May 29, 1918, more than three months after the setting of the case for trial, at which time the case had narrowed down and was confined to the issues between the appellant and the defendants Con West and his surety, the United States Fidelity & Guaranty Company. As to the issues to be tried between the parties then before the court, no one of them had demanded a trial by jury in compliance with the statute according the right upon a demand or notice prior to the time of setting the case for trial. While it is true the action was brought by the plaintiff and the proceedings were being held before the court under one case name, as provided by a special statute, yet the fact remains, under the issues framed by the pleadings of the appellant and the defendants, that as to them it constituted a separate and independent action and one in which the immediate parties concerned with the issues to be tried might either demand or waive a jury trial under the statute. The appellant having failed to demand a jury to try the issues between himself and the defendants within the time allowed him under the statute, it must therefore be held that his legal

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right to a jury trial was waived. *Davis v. D. & R. G. R. Co.*, 45 Utah, 13, 142 Pac. 709; *Utah State Building & Loan Ass'n v. Perkins et al.*, 53 Utah, 474, 173 Pac. 950. But it is further contended by appellant that the trial court had the discretionary power to order a jury trial upon the appellant's application, although the statute had not been complied with by him, and that the court's refusal was an abuse of legal discretion. Under authority of *Wood v. R. G. W. Ry. Co.*, 28 Utah, 351, 79 Pac. 182, and *Davis v. D. & R. G. R. Co.*, supra, we think the court had the power and might have exercised its legal discretion by ordering a jury trial upon appellant's application had appellant made some satisfactory showing that his failure to make timely application for a jury under the statute was excusable. He did not do that, and therefore nothing was before the trial court to invoke its legal discretion. In the absence of such a showing on the 3 part of the applicant, we cannot conceive how the trial court could well do otherwise than refuse appellant's arbitrary demand made for a jury trial. In other words, a party to an action who desires a jury trial must either demand a jury in accordance with the statute (section 6782, supra) prior to the time of setting the case for trial or within such a reasonable time thereafter as the court may order. Otherwise the court must, saving the right to call to its aid a jury on its own motion, proceed to try the issues, unless some showing is made on the part of the applicant which will appeal to the legal discretion of the court as excusing the applicant's neglect to make timely application.

The contention is next made that the findings of the trial court are not supported by the testimony, and that the findings are contrary to law. The court found, in so far as may be material to the consideration of the questions thus involved:

That the contract price for the painting of the interior and exterior of the building according to the plans and specifications of the school board agreed upon between appellant and defendant Con West was \$925, plus five dollars for the additional painting of some compo boards, in all \$930; "that by reason of the failure to furnish and apply materials required by the specifications on the exterior of said building the said painting work thereon is inferior and will

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require repainting within a short period of time, and it will cost about the sum of \$500 to repaint the exterior of said building; \* \* \* that the painting materials furnished by said Charles J. E. Gulbranson and applied to the interior of said building were inferior in quality, and by reason thereof the said interior will require refinishing; that the reasonable cost thereof will be the sum of \$227.50, and therefore the court finds that the defendant Con West was damaged in the sum of \$227.50 by reason of inferior materials being used on the interior finish of said school building and the sum of \$250 damages by reason of the inferior materials being used on the exterior of said school building; that the said defendant Con West has sustained a total damage of \$477.50 by reason of inferior work and inferior materials being used by said Intervener, Charles J. E. Gulbranson, in and under his contract for performing the labor and furnishing the painting materials for the painting work on the Liberty school building; that the said Con West advanced and paid to the said Charles J. E. Gulbranson prior to obtaining knowledge of the inferior work and inferior materials so furnished on said school building the sum of \$700; that the said Con West paid said \$700 to said Charles J. E. Gulbranson before the said Con West knew or had any knowledge that inferior materials were being used and inferior work being done by the said Charles J. E. Gulbranson on said school building; \* \* \* that, by reason of the failure of the said Charles J. E. Gulbranson to furnish the materials and perform the labor required by said specifications for said school building and required by the contract between said Con West and the said Charles J. E. Gulbranson, said Con West was damaged in the sum of \$477.50; \* \* \* that said sum will be required to make the necessary changes to conform to said plans and specifications; and that the costs and expenses necessary to make said Liberty school building, in so far as the painting work is concerned, conform to said plans and specifications, is the said sum of \$477.50."

The testimony conclusively shows that the several amounts found by the trial court in the foregoing findings are correct both as to what will be required in the way of materials and labor to make the painting of the interior and exterior of the building conform to the specifications furnished by the school board and according to the contract entered into by the defendant Con West and the appellant. We are also convinced that under the testimony the trial court's findings that the defendant Con West had no knowledge that inferior materials were being used by the appellant until after the labor of applying them or the work had been performed by the ap-

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pellant is also sustained. The finding that the defendant Con West paid to the appellant \$700 to apply on the contract price is conceded to be correct. However, it is contended by appellant that, inasmuch as the school board at the time of the trial had not made any deduction for inferior materials and work furnished by appellant for the exterior painting of the building as against the defendant Con West, said defendant had not actually suffered any deduction at the hands of the school board, and therefore he could not legally recover the amount of such damages, although actually occasioned under his contract with the appellant. In support of this contention appellant has cited as one authority the case of *Fisher v. Edgefield & Nashville Mfg. Co.* (Tenn. Ch.) 62 S. W. 27. The case cited is, in our opinion, not in point. The question there involved was whether an original contractor may be allowed damages in an action against his subcontractor for delay in completing a work before the original contractor has paid the owner the penalty that might be imposed by the owner under the contract for the delay. The Tennessee court held that, where there is a conflict in the testimony as to the cause of the delay in completing the work, and no liability has been fixed against the original contractor, an action would not lie against the subcontractor.

In the case before us, under the testimony, there was and can be no question that by reason of the appellant furnishing inferior materials the damages occasioned thereby was \$477.50, and that that amount will be required to make the work conform to the specifications furnished by the school board and with the contract entered into between the defendant Con West and the appellant. There is nothing in the record before us to show that the school board had or will release and discharge the defendant Con West from his liability under his contract to do honest work and furnish the materials called for under the specifications; nor do we think it would be sufficient, as a matter of law, for the court to have indulged in the presumption that the school board would not hold its contractor to a strict accountability for not complying with the specifications furnished him. It is the general rule,

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and one to which in our opinion the present case affords no exception, that damages are recoverable by way of deductions after specific work has been undertaken to be done under a contract and there has been a substantial failure to perform. *Suth. Damages* (4th Ed.) section 699, pp. 2597, 2598; *Wiebener v. Peoples*, 43 Okl. 32, 142 Pac. 1036, Ann. Cas. 1916E, 748. Nor do we think there was any waiver, under the circumstances, on the part of Con West by reason of the \$700 payment made by him to the appellant to apply on the contract price. The testimony is clear and convincing that the payment was made, as the trial court finds, before knowledge that the materials used were inferior and not in substantial compliance with the specifications and contract. The testimony shows that Eli A. Folland, an inspector of the work for the school board, during the progress of the painting work being done on the building repeatedly protested that the materials being used were apparently not according to the specifications, at which time the appellant falsely represented and insisted that they were substantially the same.

Moreover, the testimony further tends to show that the 4-6 appellant was warned that defective materials would not be accepted as complying with the provisions of his contract under which he was performing the work. The same rule with regard to acceptance obtains; that is to say, there must be an acceptance with knowledge on the part of the acceptor that the work or material is defective or inferior. *Bowers*, Law of Waiver, page 19; *Robertson v. King*, 55 Iowa, 725, 8 N. W. 665, 666; *Wiebener v. Peoples*, 43 Okl. 32, 142 Pac. 1036, Ann. Cas. 1916E, 748; *United States v. Walsh*, 115 Fed. 697, 52 C. C. A. 419; *Ekstrand v. Barth*, 41 Wash. 321 83 Pac. 305, 306; *Monahan v. Fitzgerald*, 164 Ill. 525, 45 N. E. 1013-1015.

It is further contended, however, on the part of appellant that the judgment entered by the trial court is not supported by the findings.

The trial court found, as pointed out, that the use of inferior materials on the interior painting of the building occasioned damage to the defendant Con West to the amount

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of \$227.50, on the exterior of the building to the amount of \$250, and that the total damage by reason of said defective material used amounted to \$477.50. The court further found the contract price to be paid the appellant to be \$930, and that the defendant Con West paid to appellant \$700. The total damage occasioned by the use of inferior material amounted to \$477.50, and the actual benefits derived by the said defendant in the doing of the work by appellant would be the difference between the contract price and the damage occasioned by the inferior material, or \$452.50. The defendant having paid the appellant \$700, he would be entitled to a judgment for the amount of the difference between \$700, the amount paid, and \$452.50, the actual benefits derived under the contract, or \$247.50 only.

In view of the fact that the findings of the district court are correct and a re-trial of the case would, in our opinion, result in the same findings, and that no other 7 result would be obtainable, it is ordered that the excessive judgment entered in defendant Con West's favor for \$477.50 stand corrected and be entered herein against the appellant for \$247.50 and costs of the district court. It is further ordered that the case be remanded for that purpose to the district court, with directions that judgment be entered therein in accordance with the views herein expressed.

For the reason that the findings of the trial court were right and the rulings of said court must be affirmed in every particular with the exception of the error committed in the entry of an excessive judgment, it is further ordered that each of the parties pay one-half of the costs on appeal to this court.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

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## MUIR v. MURRAY CITY.

No. 3366. Decided Dec. 9, 1919. On Application for Rehearing, Jan. 3, 1920. (186 Pac. 433.)

1. MUNICIPAL CORPORATIONS—CONSTITUTIONAL LIMIT OF INDEBTEDNESS DOES NOT PROHIBIT PAYMENT AFTER EXPIRATION OF YEAR. Const. art. 14, section 3, limiting indebtedness of municipal corporations, inhibits only the creation of indebtedness in excess of the revenue for the current year, and does not relate to the time of payment, and if the amount of the indebtedness is limited to the revenue of the current year, there is no objection to providing for payment after the year expires. (Page 372.)
2. MUNICIPAL CORPORATIONS—WORD "TAXES," IN CONSTITUTION, LIMITING INDEBTEDNESS, CONSTRUED TO MEAN REVENUE. Although Const. art. 14, section 3, provides that no debt in excess of "taxes" for the current year shall be created by any county or subdivision thereof, the word "revenue" conveys the meaning intended, and the limit of indebtedness of a municipal corporation is not exceeded unless in excess of the potential revenues for the current year, from whatever source obtainable. (Page 373.)
3. MUNICIPAL CORPORATIONS—MUNICIPAL POWER LINES MAY BE CONSTRUCTED BEYOND BOUNDARY FOR PURPOSE OF SELLING SURPLUS POWER. Under Comp. Laws 1917, section 570x2, a city has the power to establish an electric light plant and transmission lines and provide for the proper necessities of a rapidly increasing population, and where it has a large surplus of power it may legitimately run a transmission line beyond its boundaries to a nearby city and sell such surplus power. (Page 374.)
4. MUNICIPAL CORPORATIONS—ULTRA VIRES ACTS IN BORROWING MONEY NOT VALIDATED, BECAUSE PROFITABLE. Where a municipal corporation exceeds its powers and borrows money, the fact that the illegal exercise of the power resulted in a profitable investment would be no answer to the defense of ultra vires, for cities are not organized primarily for the purpose of engaging in commercial enterprises, however profitable they may appear, or even prove to be. (Page 374.)
5. MUNICIPAL CORPORATIONS—ULTRA VIRES NOT DEFENSE TO ACTION TO RECOVER LOAN FOR CORPORATE PURPOSE. Where money was borrowed for a corporate purpose, and was profitably and judicially expended, and the city and its inhabitants derived substantial benefits therefrom, and continue to derive benefits, the city will not be permitted, under the plea of ultra vires, to es-



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cape liability, although the transaction was not in all respects regular and in strict accordance with law. (Page 375.)

ON APPLICATION FOR REHEARING.

6. **APPEAL AND ERROR—DIAGRAM PRESENTED FIRST ON REHEARING NOT PART OF EVIDENCE.** Where the record shows that a diagram was made by a witness during the trial and was admitted as an exhibit, but the exhibit was not brought up on appeal, and there is nothing in the record to indicate what the exhibit purported to show, a sketch drawn and offered for the first time on application for rehearing cannot be considered as evidence. (Page 376.)

Appeal from District Court, Third District, Salt Lake County; *Wm. H. Bramel*, Judge.

Action by James A. Muir against Murray City.

Judgment for plaintiff, and defendant appeals.

**AFFIRMED.**

*David W. Moffat*, of Murray, for appellant.

*H. V. Van Pelt*, of Salt Lake City, for respondent.

**THURMAN, J.**

Plaintiff brought this action to recover the amount due on a certain written agreement entered into by the parties March 20, 1914. The agreement provided for a loan by plaintiff to defendant in the sum of \$1,200, payable in four annual installments, evidenced by four promissory notes as follows: \$369 payable in one year, \$334 in two years, \$336 in three years, and \$318 in four years. The said sum \$1,200 was paid to defendant, and the notes executed in accordance with the agreement. It is alleged in the complaint that the money was used by defendant for corporate purposes. The interest on the loan is included in the amounts above stated. The defendant paid the first two installments when due, and refused

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to pay the third and fourth, on the alleged ground that the defendant had no power to contract the indebtedness.

Two causes of action are alleged—the first, to recover on one of the promissory notes; the second, on the written agreement for the entire balance due. It will not be necessary to consider the first cause of action. The case was tried to the court without a jury. Judgment was rendered for plaintiff, and defendant appeals.

The record discloses the facts to be: That the defendant city is a populous and progressive community in Salt Lake county, and that its population is rapidly increasing; that in the year 1913 it was engaged in the business of planning for and constructing an electric light plant for the purpose of furnishing light to the city and its inhabitants, and to that end, in the year last mentioned, was seeking to acquire, by negotiation, purchase, or otherwise, certain water rights in Little Cottonwood creek for power purposes; that in the course of its investigation as to the supply of water and its sufficiency for the purpose it ascertained that one Louis E. Despain and wife were the owners of a small electric plant near the mouth of Little Cottonwood canyon, and, for the operation of said plant, were the owners of and using the flow of five second feet of the waters of said creek; that the use of said water at the point where used interfered with the plans of defendant city and prevented it from acquiring a right to use the quantity of water it deemed necessary in view of its prospective growth and probable increase of population; that in order to secure the right of said Despain and wife, defendant procured from them a grant of their right to said five second feet of water upon divers considerations and conditions. One of the conditions was that, whenever it became necessary for the city's purpose to use all of the water required by it, including that purchased from Despain and wife, it would then furnish to them five and one-half kilowatts continuously at the point where they had theretofore developed and used it in the operation of their electric plant.

The record also discloses the fact that the defendant, having secured its right to the use of water for power purposes,

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constructed a plant and transmission line, and put the same into operation; that it had considerably more power than was necessary for its present needs, and at all times there was a large surplus for which there was no present demand; that for the purpose of supplying Despain with the power it was obligated to furnish under the terms of the contract or grant above referred to, and for the further purpose of beneficially disposing of its surplus power, in 1914 it conceived the idea of constructing a branch transmission line a mile or a mile and a quarter in length to what is known as the town or settlement of Granite, situated a distance of about seven miles beyond the boundary lines of defendant city; that for the purpose of constructing said line, and in order to raise the money therefor, it entered into the contract heretofore referred to, for the nonperformance of which this action was brought; that plaintiff was cognizant of the purpose for which the money was borrowed. The evidence further shows that by the construction and operation of said transmission line to Granite the defendant was not only thereby enabled to discharge its obligation to Despain to furnish him the power stipulated in the grant by which he conveyed his right to defendant, but defendant was also enabled to derive, and does derive therefrom, revenue to such an extent as to render the transaction a profitable investment.

Appellant contends, first, that the city had no power to create an indebtedness and make it payable from year to year except by the issuance of bonds or lawful warrants; second, that the city had no power to construct an electric transmission line beyond its boundary lines for the purpose of supplying another community with electric light.

1. In support of its first proposition appellant quotes from the state Constitution (article 14, section 3) as follows:

"No debt in excess of the taxes for the current year shall be created by any county or subdivision thereof, or by any school district therein, or by any city, town or village, or any subdivision thereof in this state, unless the proposition to create such debt shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein, in the year preceding such election, and a majority of those voting thereon shall have voted in favor of incurring such debt."

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This section of the Constitution undoubtedly prohibits a municipality from creating an indebtedness in excess of the revenue for the current year unless the proposition is submitted to a vote of the qualified electors and approved by a majority thereof. But the inhibition only goes to the question of excess amount and not to the time of payment. If the amount of the indebtedness is limited to the revenue of the current year, we know of no constitutional objection to providing for payment after the year expires. In the instant case there is no substantial evidence as to whether or not the debt created was within the revenue of the current year. It is true one witness testified that at the time the debt was created the bond money was exhausted and there was no other available revenue. Just what this language implies as relates to the question under review is not at all clear. It may imply simply that there was no money on hand, no cash in the treasury against which warrants could be drawn—that is, no fund immediately available. For aught that appears in the evidence the potential revenue of the city, such as uncollected taxes, current license fees, fines, and other sources of revenue, may have been amply sufficient to cover the indebtedness in question, and if such was the case the creation of the indebtedness was not prohibited by the Constitution.

Notwithstanding the section of the Constitution above quoted uses the word “taxes,” instead of the word “revenue,” we are inclined to the view that the word “revenue” conveys the meaning intended. It is hardly possible to conceive that the members of the constitutional convention intended anything other than that the city, in creating an indebtedness without submitting it to the electorate, should keep within the revenue of the current year. Many reasons exist in favor of such an interpretation, and, so far as we can see, there are none against it. We do not understand that counsel for appellant holds a contrary view. Indeed, we feel justified in assuming that as to the interpretation adopted by us counsel is in full accord. In connection with his quotation from the Constitution he also quotes the following language from 28 Cyc. at page 1540:

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"'Pay as you go' expresses a municipal rule, prevailing in some states, that annual expenditures must be restricted to annual revenue, of which every person contracting with the municipal corporation must take notice at his peril; but 'income and revenue' includes sums coming into the municipality from other sources than taxation."

It is not necessary to further discuss this phase of the case. The contention of the city that it had no power to create the debt in question, on the ground that it exceeded 2 the limit fixed by the constitutional provision quoted, should not prevail, in the absence of proof that the debt was in excess of the potential revenues for the current year from whatever source the revenue was legitimately obtainable. Having failed to make such proof, its contention in this regard is without merit.

2. Under its second proposition appellant insists that, inasmuch as the purpose of the indebtedness was to raise funds to construct an electric transmission line to furnish power to a community seven miles or more beyond the municipal boundaries of defendant city, therefore the creation of the debt was ultra vires, and the defendant not liable therefor. Neither the ethics nor the morality of this contention need be considered. If the city had no power to create the indebtedness, and there were nothing in the case to relieve it from the hardship sometimes resulting from the defense of ultra vires, the city would not only be justified in setting up the defense, but it might become its bounden duty so to do. In such case the fact that the illegal exercise of the power resulted in a profitable investment would be no answer to the defense of ultra vires, for cities are not organized primarily for the purpose of engaging in commercial enterprises, however profitable they may appear or even prove to be. But in determining the rights of the parties litigant in this, as in every case that comes before the court, our duty is to find, if possible, the controlling facts and principles involved. If we rightly consider these, we cannot go far astray. In the case at bar the city had the power to establish an electric light plant and transmission line, beyond its boundaries, if necessary, for the purpose of supplying light for itself and in-

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habitants. Comp. Laws Utah 1917, section 570x2. It had the power to purchase water rights for that purpose, and pay in cash or by furnishing power in exchange therefor. *City of Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316.

If it became necessary to furnish power, instead of payment in cash, as shown by the record in the present case, then it had the right to deliver that power at the point agreed upon in the contract, whether that point be within or without the city. In constructing its works and obtaining its power, it was its duty to pay due regard to the future, and provide for the probable necessities of a rapidly increasing population. In such case it could not but happen, as it did happen in the present case, that when the works were completed and put into operation the city found it had a large surplus of power over and above all present demands, or probable demands for many years to come. In these circumstances, what did defendant do? It sought for customers to take its surplus. It was unable to find a sufficient number. Inasmuch as it was compelled to furnish a certain quantity of power to Despain in exchange for his rights, it concluded to extend the line on to Granite, which afforded a paying market for 3, 4 a small portion of its surplus. This the city did, and in doing so found it necessary to borrow the money and create the indebtedness which constitutes the subject-matter of the present action. The investment proved to be a profitable one, and while, as before stated, cities are not organized primarily as profit-making concerns, yet when it is incidental, as in the instant case, to a proper exercise of its legitimate powers, the making of the enterprise a profitable one was highly commendable. This view is sustained by many well-considered cases which have been called to our attention. *City of Henderson v. Young*, 119 Ky. 224, 83 S. W. 583, a Kentucky case, is exactly in point. The third paragraph of the syllabi reads as follows:

"Ky. St. 1903, section 3290, subsec. 5, authorizing cities of the third class to provide 'the city and the inhabitants thereof' with light, etc., does not prohibit the city from extending its electric light service to points without the city limits, where it can do so with very little additional expense, and in such a way as to result in advantage to the city and its inhabitants."

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The following authorities are to the same effect: *Rogers v. City of Wickliffe*, 94 S. W. 24; *Milligan v. Miles City et al.*, 51 Mont. 374, 153 Pac. 276, L. R. A. 1916C, 395; *Pike's Peak Power Co. v. City of Colorado Springs*, 105 Fed. 1, 44 C. C. A. 333; *Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316; *McQuillin*, Mun. Corps. section 1800. Many other cases are cited by respondent having more or less bearing upon the question of ultra vires. The foregoing, in our opinion, are sufficient to indicate what the law is in a case of this kind.

On the question of ultra vires appellant cites and relies on *Dillon*, Mun. Corps. sections 89 and 312; *State v. Post Astoria*, 79 Or. 1, 154 Pac. 399; *Farwell v. City of Seattle et al.*, 43 Wash. 141, 86 Pac. 217, 10 Ann. Cas. 130; *In re Town of Woolley*, 75 Wash. 206, 134 Pac. 825; 28 Cyc. 266. These cases and authorities are readily distinguishable from the case at bar, and need not be reviewed at length. Each of them is controlled by local statute, and in that connection it is pertinent to remark that perhaps no state in the Union confers greater powers upon its municipal corporations than does the state of Utah. See, specially, Comp. Laws Utah 1917, section 570x2, heretofore cited, relating to the power of cities to purchase, hold, and dispose of property real and personal within or without their corporate boundaries.

In view of the facts and circumstances disclosed by the record in this case and the law applicable thereto, the court can arrive at no other conclusion than that the defendant is legally liable for the debt in question. 5

The money was borrowed for a corporate purpose. It was profitably and judiciously expended, and the city and its inhabitants have already derived, and in years to come will continue to derive, substantial benefits therefrom. In these circumstances, even if the transaction were not in all respects regular and in strict accordance with law, this court does not feel authorized to say that the defendant should be permitted under the plea of ultra vires to escape its liability. *Turner v. Cruzen*, 70 Iowa, 202, 30 N. W. 483; *Natchez v. Mallery*, 54 Miss. 499; *Grand Island Gas. Co. v. West*, 28 Neb. 852, 45 N. W. 242; *Chapman v. County of Douglas*, 107 U. S. 348, 2

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Sup. Ct. 62, 27 L. Ed. 378; *Laird Norton Yards v. City of Rochester*, 117 Minn. 114, 134 N. W. 644, 41 L. R. A. (N. S.) 473; *Long v. Lemoyne Borough*, 222 Pa. 311, 71 Atl. 211, 21 L. R. A. (N. S.) 474.

The judgment is affirmed, at appellant's cost.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

ON APPLICATION FOR REHEARING.

THURMAN, J.

On application for rehearing appellant insists that the court assumed there was some connection between the transmission line to Despain and the line to Granite, while, as contended by appellant, there is no connection whatever. In support of the contention appellant appends to its application a sketch made by its engineer, purporting to show that there is no connection between the two lines. The sketch was made since the opinion was handed down, and is now brought to our attention for the first time. The record indicates that something purporting to be a diagram of the premises, made by a witness during the trial, was admitted as an exhibit; but the exhibit was not brought up on appeal, nor is there anything in the record to indicate what the exhibit purported to show. In these circumstances the sketch offered cannot be considered as evidence.

The record, without the sketch, does not show that the lines were disconnected. On the other hand, there is evidence tending to show that, as the line had to be constructed for the benefit of Despain, it was a saving of expense to construct the Granite line. However, the question of the relation of the two lines to each other was not a controlling factor in our opinion. The evidence, without conflict, disclosed the fact that the city, in constructing its plant, with a view to its future needs, acquired a large surplus of power for which it had no present use; that it endeavored to find



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customers for its surplus among its own inhabitants, but was unable to do so. It then conceived the idea of disposing of it to customers outside its boundary lines. The people of Granite desired, and could use, a portion of the power that was going to waste. The power could be supplied at a comparatively small expense, and property which was being wasted put to beneficial use. The money was borrowed, the line constructed, and the uncontradicted evidence shows that the city has been greatly benefited by the transaction. The city, for its own benefit, has had the profitable use of the plaintiff's money ever since the line was completed. It would be inequitable, in the strongest sense of the word, for the city in those circumstances to longer withhold from plaintiff that which is justly due. Instead of further struggling to defeat plaintiff's claim, it ought to feel gratified to know that a way can be found by which it is enabled to pay its honest debts.

Rehearing denied.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

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ASSOCIATED INV. CO. v. CAYIAS et al.

No. 3381. Decided December 10, 1919. Rehearing denied January 2, 1920. (185 Pac. 778.)

1. **BROKERS—BROKER SUING FOR COMMISSION NEED NOT PLEAD AND PROVE CONDITION SUBSEQUENT.** In broker's action for commission on sale of a pool hall, where sale contract provided that it was to be null and void if purchaser could not secure rental of the hall at a certain sum per month, plaintiff was not required to plead or prove the ability of the purchaser to procure the hall at such rental, that being a matter of defense, as a condition subsequent, and not a condition precedent. (Page 382.)
2. **BROKERS—PERFORMANCE OF CONDITION SUBSEQUENT MUST BE PLEADED.** In a broker's action for commission, where defendants failed to plead as a defense that a condition subsequent embraced in the sale contract had not been performed, it was not error to refuse defendants' offered testimony thereon. (Page 383.)

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3. **BROKERS—ADMISSIBILITY OF EVIDENCE OF PRINCIPAL'S BREACH OF CONTRACT.** In a broker's action for commission on the sale of a pool hall, testimony tending to show defendants' refusal to carry out the terms of the contract *held* admissible. (Page 383.)

Appeal from District Court, Third District, Salt Lake County; *P. C. Evans*, Judge.

Action by the Associated Investment Company, a corporation, against William Cayias and another, a copartnership doing business as the Portola Pool Hall.

Judgment for plaintiff, and defendants appeal.

**AFFIRMED.**

*Rogers & Haas* and *Chris Mathison*, all of Salt Lake City, for appellants.

*Smith & Son*, of Salt Lake City, for respondent.

CORFMAN, C. J.

Plaintiff, as a real estate and personal property broker, brought this action against the defendants in the district court of Salt Lake county to recover commissions alleged to have become due for services rendered under a contract for the sale or exchange of a certain pool hall owned by the defendants in Salt Lake City. The contract sued upon provides:

"Please sell or trade for me the following described property at the price and terms below mentioned: Portola Pool Hall, No. 2 West Second South street, consisting of eleven tables, one card room. Rent, \$150.00. Business averages about thirty dollars per day. Price \$4,000.00; \$2,000.00 down, balance to suit. If you secure a purchaser for me who is ready, able and willing to buy or trade for said property at the price and terms above mentioned, or on any other terms agreed to by me, I will pay you ten per cent. commission on the above amount or on any other amount for which I agree to sell or trade."

It is alleged, in substance, in the complaint, that the plain-

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tiff, acting under said contract, made diligent effort to exchange or trade said property for the defendants, and that on or about October 13, 1916, procured one Lawrence Call, who entered into a written agreement for the exchange of said pool hall, at a valuation of \$3,000, for other property, which was satisfactory to the defendants, and that the said Call was at all times ready, able, and willing to complete and carry out the said agreement so entered into, but that the defendants refused to make an exchange; that there is due and payable to the plaintiff from the defendants the sum of \$300 for procuring the said Call to enter into said agreement, for which sum judgment is prayed.

Defendants' answer denied, generally, the allegations of the complaint. Trial was to the court without a jury. The findings made were in plaintiff's favor, and judgment was entered against the defendants for the amount demanded in the complaint. Defendants appeal.

The errors assigned go to the admission and exclusion of certain testimony, that the court's findings "were not within the issues made by the pleadings or litigated upon the trial of the action," and also that—

"The evidence is insufficient to sustain the decision in the following particulars: (1) That it does not show that the plaintiff found and produced a purchaser willing, ready, and able to buy or trade for the defendant's property; (2) that it does not show that the plaintiff found and produced a purchaser with whom the defendants entered into a binding and enforceable contract to sell or trade their property; (3) that it does not show that the plaintiff found and produced a purchaser to whom the defendants sold or traded and conveyed their property; (4) that it does not show that the plaintiff in any manner performed its contract of employment."

The testimony shows beyond dispute that the listing contract sued upon was entered into between the parties, and that thereafter, on October 13, 1916, the plaintiff procured one Lawrence Call to enter into an agreement with defendants for an exchange of their pool hall for certain residence property situated in Salt Lake City. Under the terms of the agreement entered into between the defendants and Call, it was provided, among other things not necessary to here men-

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tion or consider, that "the bill of sale for said pool hall and warranty deed to said house are to be delivered and exchanged at the office of the Associated Investment Company, authorized agents in this deal, on or before October 14, 1916," and that "it is further agreed that in the event the rental on the above-described pool hall cannot be obtained for a monthly rental of \$150 by the first party hereto, then and in that event this agreement shall become null and void and of no effect."

The trial court, after making findings that the aforesaid contracts had been made by the defendants, and that under the listing contract the plaintiff had procured Call to make an exchange of property with the defendants upon a property valuation of \$3,000, for the pool hall, the court further found, and the finding is supported by testimony, that on October 14, 1916, the day following the signing of their contract with Call, the defendants called at the office of the plaintiff and "requested the plaintiff to reduce the amount of the commission due to the plaintiff by the defendants for acting as such broker from \$300 to fifty dollars and said defendants at said time and place said to plaintiff that if the plaintiff would not so reduce its said commission the defendants would not carry out any terms of said contract by them to be performed as in said contract provided. The court finds that the plaintiff then and there refused to reduce the amount of its said commission, and that thereupon and at said time and place the defendants refused to carry out their part of said written agreement and so notified the plaintiff; and the court finds that in the manner before stated the defendants repudiated said written contract and every part thereof."

It is contended on the part of the defendants, to use their own expression, that "the contract in question is not, on its face, enforceable as to Call because it does not show that he was ready, able and willing to make the exchange," and also that performance of the contract entered into between the defendants and Call rested upon the contingency that a rental of the pool hall could be had by Call at \$150 per month. Defendants further argue:

"The contingency here must have happened before performance

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and is, consequently, in the nature of a condition precedent, the fulfillment of which, within the time fixed for the performance of the contract, it was incumbent upon the plaintiff to plead and prove, in order to entitle it to recover in this action."

On the other hand, it is contended by the plaintiff that the condition imposed by the terms of the contract of exchange, wherein it was provided the contract should become null and void and of no effect in the event the pool hall could not be obtained for a monthly rental of \$150, was a condition subsequent, and that therefore the plaintiff had earned its commission as soon as it procured Call to enter into a binding contract with the defendants; and further that the repudiation of the contract entered into by defendants with Call relieved the plaintiff from pleading or making any proof as to the ability of Call to procure the pool hall at a rental of \$150 per month.

The authorities are practically agreed that there are no technical words to distinguish between "conditions precedent" and "conditions subsequent," but that the distinction is a matter of construction, according to the intention of the parties as manifested by the contract. The terms are therefore variously defined according to the facts and circumstances and the questions involved in a particular case. As applying to contracts, in general they are defined as follows:

"Conditions precedent call for the performance of some act or the happening of some event after a contract is entered into and upon the performance or happening of which its obligations are made to depend." 6 R. C. L. section 290.

"A condition subsequent in a contract is one which follows the performance of the contract and operates to defeat or annul it upon the subsequent failure of either party to comply with the condition." 6 R. C. L. section 291.

In the contract we have under consideration, the parties thereto agree to exchange property upon the terms fixed and for considerations stated. No conditions are imposed. The agreement to make the exchange is positive and certain. As we read and interpret the language employed, the exchange of property between the parties does not rest upon any future contingency or the happening of any future event whatever. The parties explicitly agree that, if the pool hall cannot be

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obtained by Call for a fixed rental, the "agreement shall become null and void and of no effect," thus expressly recognizing that a valid, binding, and enforceable contract with respect to the exchange of property has been made between them. We cannot conceive of any language that could be employed in a contract which would more clearly express a condition subsequent than the words used by the parties to this agreement imply. Like provisions in contracts of a similar character are generally regarded as conditions subsequent. *Northwestern Nat. Life Ins. Co. v. Wood*, 56 Okl. 188, 155 Pac. 524; *Taylor v. Modern Woodmen*, 72 Kan. 443, 83 Pac. 1099, 5 L. R. A. (N. S.) 283.

The plaintiff was not therefore required to plead nor prove the ability of Call to procure the pool hall at a rental of \$150 per month. If Call was unable to procure the 1 hall at the stipulated rental, it was incumbent upon the defendants to plead that fact and prove it. *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 38 N. E. 1011, 26 L. R. A. 313, 49 Am. St. Rep. 699; *Root v. Childs et al.*, 68 Minn. 142, 70 N. W. 1087; *Bear v. Atlantic Home Ins. Co.*, 34 Misc. Rep. 613, 70 N. Y. Supp. 581.

In 9 Cyc. at page 727, the rule of pleading is tersely stated to be:

"Thus in an action on a contract which on its face refers to a contingency on the happening of which the defendant should be discharged from liability, the plaintiff need not aver that the contingency has not happened; but if the defendant relies on it as a defense he must allege and prove that it did not happen."

The defendants by their answer failed to allege that the pool hall was not obtainable at a monthly rental of \$150. Moreover, there is testimony in the record tending to show that the pool hall, as a matter of fact, could have been procured by Call at the stipulated rental. It will be borne in mind that the listing card received in evidence so represents.

Among the numerous cases cited in defendants' brief, special stress is placed upon the following cases, which, in effect, hold that before an agent is entitled to recover commissions he must produce a buyer who shall be ready, willing, and able to make the purchase on absolutely the terms fixed by the

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owner: *Zeidler v. Walker*, 41 Mo. App. 118; *Sullivan v. Miliken*, 113 Fed. 93, 51 C. C. A. 79; *Hobart v. Kehoe*, 110 Minn. 490, 126 N. W. 66, 136 Am. St. Rep. 524.

These cases, and the many others cited in defendants' brief, correctly state the law as we understand it to be. Counsel, however, seem to lose sight of the fact that the rulings in the cases cited by them are predicated on conditions precedent and not upon conditions subsequent as heretofore pointed out. The cases therefore are distinguishable and have no application to the rule of law that must be applied in the case at bar.

Again, we are not inclined to look with much favor upon the attempt of the defendants to repudiate their contract with the plaintiff. Nor do we think that under the circumstances, as shown by the testimony in this case, any other self-respecting court would be. The testimony tends to show that after the plaintiff had made diligent effort to make an exchange of property and a binding agreement had been procured from Call to enable them to do so the defendants openly asserted that they would not keep their engagements with Call unless the plaintiff accepted a mere pittance for the services rendered. This the plaintiff declined to do, and, under the circumstances and for the reasons stated, we feel that the findings of the trial court were right and fully justified.

What has been said with regard to the failure of the defendants to plead as a defense the fact, if such were the fact, that the condition subsequent had not been performed, with respect to the matter of Call procuring the pool hall at the stipulated rental, we think also fully justified the trial court in excluding the testimony complained of as error.

The defendants, over the objection of plaintiff, offered to prove a fact that essentially should have been alleged in their answer if they expected to offer testimony to  
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prove it.

Under the allegations of the complaint, and over the objection of defendants, testimony was introduced tending to show the refusal of the defendants to carry out  
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the terms of the contract, although counsel for plaintiff announced that he did not deem the testimony necessary for

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the purpose of a recovery. We do not think its admission was error.

Finding no reversible error in the record, it is ordered that the judgment of the district court be affirmed, with costs.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

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CRAM et al. v. REYNOLDS et al.

No. 3368. Decided December 12, 1919. (186 Pac. 100.)

1. REFORMATION OF INSTRUMENTS—PROOF OF MUTUAL MISTAKE TO AUTHORIZE REFORMATION MUST BE CONVINCING. Mutual mistakes can be corrected, and courts will reform a contract so as to express what the parties actually agreed on and make it express the terms on which the minds of both parties met, but the proof must be clear, distinct, satisfactory, and convincing, and not merely a preponderance of the evidence.<sup>1</sup> (Page 386.)
2. EVIDENCE—INFERENCE AGAINST PARTY FROM FAILURE TO REBUT ADVERSE EVIDENCE. When a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, omission to do so furnishes a strong inference against him. (Page 389.)
3. APPEAL AND ERROR—FINDINGS IN EQUITY MAY BE DISREGARDED. In an equity case, when the findings of fact are clearly not justified by the evidence, in the opinion of the Supreme Court, it is the court's duty to arrive at the conclusion it thinks compelled by the proof, regardless of the trial judge.<sup>2</sup> (Page 392.)
4. REFORMATION OF INSTRUMENTS—MISTAKE IN OMISSION FROM CONTRACT OF WATER RIGHTS OR STOCK SHOWN BY EVIDENCE. Evidence held to show that written contract for the sale of land by defendants to plaintiffs omitted certain water rights or shares of stock in an irrigation company by mutual mistake of the parties known to and fraudulently relied upon by a defendant. (Page 392.)

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<sup>1</sup> *Wheritt v. Dennis*, 48 Utah, 309, 159 Pac. 534; *Weight v. Bailey*, 45 Utah, 584, 147 Pac. 899; *Deseret National Bank v. Dinwoodey*, 17 Utah, 43, 53 Pac. 215; *Ewing v. Ketch*, 16 Utah, 312, 52 Pac. 4.

<sup>2</sup> *Little v. Stringfellow*, 46 Utah, 576, 151 Pac. 347.



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Appeal from District Court, Third District, Salt Lake County; *W. H. Bramel*, Judge.

Action by Sidney A. Cram and Lutie M. Cram against C. D. Reynolds and Annie E. Reynolds.

From decree for defendants, plaintiffs appeal.

REVERSED, and CAUSE REMANDED, with directions.

*David W. Moffat*, of Murray, and *Ray Van Cott*, of Salt Lake City, for appellants

*Dan B. Shields*, of Salt Lake City, for respondents.

WEBER, J.

Plaintiffs brought this action against defendants for the purpose of reforming a certain written contract so as to include within the reformed contract eleven shares in the Cahoon & Maxfield Irrigation Company and for specific performance of the contract when thus reformed. Plaintiffs allege in their complaint the making of the contract and that it was understood and agreed by the parties thereto that defendants should transfer and deliver to plaintiffs as part of the consideration eleven shares of the capital stock of the Cahoon & Maxfield Irrigation Company, but that through the mutual mistake of the parties the eleven shares of stock were omitted from the contract. The bill seeks a reformation of the contract so as to include the eleven shares of stock of the irrigation company. Plaintiffs further in their complaint pray for a decree requiring that defendants perform their part of the contract by transferring and delivering the said eleven shares of stock to plaintiffs. The defendants in their answer admit the execution and delivery of the contract referred to, but deny that said eleven shares, or any part thereof, entered into the consideration of the contract, and affirmatively allege that the contract as written contains all the

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terms and stipulations to which the several parties thereto had agreed. The issues were found in favor of defendants by the trial court, and from the decree accordingly entered plaintiffs appeal.

Mutual mistakes can be corrected, and courts will reform a contract so as to express what the parties actually agreed upon and make it express the terms upon which the minds of both parties met. The law on the subject is well established in this jurisdiction. If the same mistake be made by both parties, the contract may be rectified, but the proof must be clear and distinct, as courts do not make contracts for parties. To secure reformation of a written contract which is presumed to be the real contract and to contain all the terms agreed upon, the party seeking relief and demanding reformation of the contract must establish the mutual mistake by evidence that is clear, satisfactory, and convincing, and not merely by a preponderance of the evidence. *Wherritt v. Dennis*, 48 Utah, 309, 159 Pac. 534; *Weight v. Bailey*, 45 Utah, 584, 147 Pac. 899; *Deseret National Bank v. Dinwoodey et al.*, 17 Utah, 43, 53 Pac. 215; *Ewing v. Keith*, 16 Utah, 312, 52 Pac. 4. The only question involved in this case is whether the proof produced by appellants, considered in connection with that offered by respondents, measures up to the required standard. The answer to this question necessitates a review of the testimony.

Sidney A. Cram and his wife, Lutie M. Cram, were residents of Idaho in the fall of 1917 and owned a 200-acre dry farm in that state. Desiring to sell or trade their Idaho farm, they inserted an advertisement to that effect in the Salt Lake Tribune. The advertisement was answered October 9, 1917, by C. D. Reynolds and Mrs. Annie E. Reynolds, his wife, respondents herein, who in their letter said they had a small place near Murray, Utah, with a bungalow and two three-room houses on it, "very best soil that will raise anything; eleven shares of mountain water, enough for twice this amount of land, which is very valuable—about \$150 per share now." After some correspondence between the parties Reynolds went to Idaho and looked over the Cram farm, and

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there said that, if Mrs. Reynolds was satisfied with his description of the property they would consider a trade. During the discussion, in referring to the exchange of property, Reynolds said that he proposed to trade to the Crams property consisting of six acres of land, three brick houses, and eleven shares of water right, the water right or shares being enough for twice the amount of land and being valued at \$150 per share. During the conversation Mr. Reynolds asked Cram if he had done any irrigating, and Cram answered in the negative. Reynolds said that a neighbor would show him how to irrigate. Reynolds also stated to the appellants that he secured this water right of eleven shares so he could better sell the place. Three witnesses, Mr. and Mrs. Cram and Mrs. Jennie Harvey, the mother of Mrs. Cram, all testified to the effect that Mr. Reynolds, when in Idaho, positively assured Mr. Cram that he had eleven shares of water right, and that the same would be exchanged in connection with the six acres of land and improvements thereon, and that this water right was enough for twice the amount of land, and that it was of the value of \$150 per share. A week or ten days after Reynolds made his visit to Idaho the Crams went to Murray to examine the Reynolds property. While such examination was being made Reynolds explained how the land could be irrigated, and, testifying about this conversation, Mrs. Cram says that they could tell it had been irrigated, and at that time Reynolds said that the water right was in the Cahoon & Maxfield ditch. Appellants further testified that Reynolds promised and agreed that he would turn over the water certificates, one for ten shares and one for one share, at the time the deeds were signed and exchanged. Both of the Crams also testified that Reynolds said that the water went with the land. After examining the Reynolds property a trade was agreed upon, and as part of the agreement a number of articles were to be left on each property. The negotiations continued till Saturday night, November 3, 1917. Mrs. Cram had in the meantime made a memorandum of the personal property to be exchanged. The parties agreed that Mr. D. W. Moffat, a lawyer of Murray who was known to Reynolds, should be em-

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ployed to prepare a written agreement. Articles of furniture, machinery, and live stock on both sides were to be exchanged. As the Crams were anxious to return to Idaho, an appointment was made for the next day, Sunday, at Mr. Moffat's office, where the contract sought in this action to be reformed was drawn by the attorney. The deeds had been executed, and the documents were all present and before the parties at the time when Reynolds asked Moffat to step into an outer room of the office out of the presence of Mrs. Reynolds and Mr. and Mrs. Cram. When alone with Moffat Reynolds said: "The water rights in the Cahoon & Maxfield ditch are not specifically mentioned in the contract; will the water rights pass by these deeds we have just signed?" He was told: "The water rights to land pass by deed in the state of Utah unless the water rights are in incorporated companies; if they are in incorporated companies, they do not, but, Mr. Reynolds, you understand the whole basis of this transaction is that you are expected to convey those water rights; they should go in connection with the deal." Reynolds replied, "Do you think they can require me to?" and was told by Moffat, "Yes; not only that, but you ought to," to which Reynolds answered, "Well, I'll let them sweat a little while, anyway." Mr. J. J. Proctor testified to his familiarity with the Reynolds land, which is on what is known as the Olsen fork or branch of the Cahoon & Maxfield ditch; that Reynolds purchased some water rights in the Guilbert fork and had it transferred to the Olsen fork. He further testified that Mr. and Mrs. Reynolds came to his home just the day before he testified in this case, and in the course of the conversation Reynolds said, "I sold this man the water, but he has never paid me for it." James E. Clay testified that Reynolds made application to the directors of the Cahoon & Maxfield Irrigation Company for permission to change the water from the Guilbert fork to the Olsen fork of the Cahoon & Maxfield ditch. This was done shortly prior to the time of the exchange of these respective properties. C. D. Reynolds, one of the defendants, was placed upon the witness stand by the defense, and, after answering some preliminary questions, he was interrogated and answered as follows:

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"Q. I will ask you now, does the contract here in evidence marked 'Plaintiffs' Exhibit whatever it is, contain all the items which you agreed to exchange with Mr. Cram? A. Yes, sir. Q. And you are sure that there are no other things that you agreed to exchange with him? A. Yes, sir."

On cross-examination he denied what the Crams said about his claiming that a bobsled had been omitted from the contract. Mrs. Reynolds corroborated the testimony of her husband, but said she did not remember any conversation at Moffat's office, and that the only thing said about the water was after the deeds had been signed, when Mr. Cram said, "Now, you will have to turn over the water." On being recalled to the witness stand Reynolds said he had heard Mr. Moffat testify to the conversation, and that no such conversation was had. He was further questioned by his counsel and answered as follows:

"Q. Was this water some of the material that was left out of the contract at one time and put in at others, and taken back and forth? A. Yes. Q. Was it when Mrs. Cram had reduced this matter to writing and had put down in her book the things she wanted and you had agreed upon the things you would get, was it then you went to Mr. Moffat and had this thing reduced to writing? A. Yes, sir. Q. And there is nothing in the contract, is there, that you didn't agree to give, and there is nothing outside of that contract that you promised to give? A. No, sir. Q. In other words, this contract contains exactly what you agreed to give and exactly what you agreed to take? A. All we finally decided on. Q. And when the deeds were signed and executed you gave exactly what you agreed to give and you got exactly what you agreed to take? A. Yes, sir."

In rebuttal Mr. and Mrs. Cram testified that there never was any conversation between them and Mr. Reynolds at any time when it was agreed that the water right should be left out.

The statement that the water went with the land, repeatedly made by Reynolds, as shown all through the evidence and never denied by him, was intended as and was a statement of fact, not a legal conclusion on the part of Reynolds. If he had said the agricultural implements on the place go with the land, and such implements had been left out of the contract, and that statement had been proven as

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clearly, distinctly, and satisfactorily as the statement by Reynolds that the water went with the land, it would be impossible to escape the conclusion that it was the intention of the parties to the contract to include the agricultural implements in the exchange. The statements of the Crams that Reynolds said he would turn over the water certificates when the deeds were signed; that he said that the water was worth \$150 per share; that when the trade was finally closed Reynolds said he would have to buy one share of water to make the 11 shares he proposed to deliver; that Reynolds said Cram could sell part of the 11 shares of water to pay off the mortgage on the land obtained from Reynolds; that the water was water in the Cahoon & Maxfield ditch—none of that testimony is denied by respondents. All they said to negative the testimony of the Crams was a general and sweeping assertion that nothing was omitted from the contract. The details of the conversations with the Crams were carefully avoided, and the repeated statements by Reynolds that the water went with the land, and his promises to include the water stock in the trade, were repeatedly testified to by the Crams, and not once denied by either Reynolds or his wife. The testimony of the Crams being uncontradicted except inferentially, what weight should be given to their testimony? Should it not be accepted as true? Is there any reason for its exclusion from consideration? The presumption is that Reynolds would have denied that testimony when on the witness stand if he intended to dispute what the Crams said on that subject. No reason appears in the record for rejecting the definite and affirmative testimony of Mr. and Mrs. Cram regarding the water stock. The fact that the positive testimony of the Crams as to what Reynolds said in relation to the water stock was not denied by him adds additional weight to the claims of appellants. It is a legal maxim that when a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him. *Louisville, N. A. & C. Ry. Co. v. Thompson, Adm'r*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120, citing *Broom*, Legal Max. 936. It is

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obvious that on that Sunday at Moffat's law office Reynolds noticed the omission of the water stock from the contract and from the deed, and that he then sought to take advantage of the mistake that had been made. Then it was that he began to palter with his plighted word and in private said to Moffat: "The water rights in the Cahoon & Maxfield ditch are not specifically mentioned in the contract; will the water rights pass by those deeds?" Upon being told that he could be required to transfer the water rights and that he ought to transfer the water stock, he answered: "I will let them sweat a little while, anyway." Reynolds sweepingly denies that such a conversation occurred, but his denial of what was testified to by D. W. Moffat, a reputable member of the bar of Utah, and a citizen of high standing, weakens, if it does not wholly destroy, Reynolds' testimony. When the water shares were later on that night demanded by Mrs. Cram, Reynolds began the sweating process—the process of delaying that which he had agreed to do, not by refusing to deliver the stock, not by saying that the water was not to be delivered, or that the water did not go with the land, but by the petulant declaration that he had signed enough papers and would sign no more that day.

The day before the trial in the district court Mr. and Mrs. Reynolds went to the house of J. J. Proctor, a member of the board of directors of the Cahoon & Maxfield Irrigation Company and its water master. In a conversation then had with Mr. Proctor, Mr. Reynolds, in referring to Cram, said, "I sold this man the water, but he has never paid me for it." Neither Mr. nor Mrs. Reynolds denied the testimony of Proctor. The only explanation of the Moffat and Proctor testimony attempted by counsel for respondents is the statement that, "if the testimony of Moffat and Proctor are to be believed, Reynolds is put in an anomalous position," and if that situation pertains he is "both a fool in the superlative degree and at the same time one of the most designing and crafty of men." Our impression is that Reynolds is not a fool in the superlative degree, nor is he one of the most designing and crafty of men, but the testimony in this case does justify a suspicion

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that he is neither exceptionally bright nor particularly honest.

Taking the testimony as a whole, and as we view and weigh it, the conclusion therefrom is irresistible that appellants established the allegations of their complaint by 3, 4 proof clear, satisfactory, and convincing. We fully realize that we have not the advantage of seeing and hearing the witnesses. The weight to be given to the testimony of witnesses often depends greatly upon the appearance, manner, and conduct of the witnesses upon the witness stand, their intelligence, their willingness or unwillingness to testify fully and frankly upon all matters within their knowledge without reference to whom it affects, and whether they are free from passion and prejudice. The learned judge of the trial court had the opportunity of observing all these matters. This court always gives due consideration to the fact that the trial judge saw the witnesses and heard the evidence from their lips, but when in an equity case findings of fact are clearly not, in our opinion, justified by the evidence, it is our duty to arrive at the conclusion we think is compelled by the proof, regardless of the opinion of the trial judge. *Little v. Stringfellow*, 46 Utah, 576, 151 Pac. 347. In this case we have read and reread not only the abstract, but the transcript of the evidence, and the conviction is forced upon us that the proof of mutual mistake is overwhelming, and that it has been established by clear, satisfactory, and convincing proof that the 11 shares of water stock described in the complaint were by mutual mistake omitted from the contract sought to be reformed.

The judgment is therefore reversed, and the cause is remanded to the district court, with directions to make findings of fact and conclusions of law in harmony with this opinion, that the contract be reformed, and that as reformed specific performance thereof be decreed; appellants to recover costs.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.



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**HOUSTON et al. v. UTAH LAKE LAND, WATER & POWER CO. et al. (STARR et al., Interveners).**

No. 3382. Decided December 20, 1919. (187 Pac. 174.)

1. **CORPORATIONS—AUTHORITY OF PRESIDENT DIED WITH CORPORATION.** Where the right of a corporation to do business was annulled and its charter forfeited because it failed to pay the state corporation license tax, any authority that the president of the corporation had by virtue of resolutions of the board of directors died with the corporation. (Page 400.)
2. **CORPORATIONS—"ULTRA VIRES" ACT AN ACT BEYOND POWERS.** An "ultra vires" act is an act beyond the powers of the corporation. (Page 400.)
3. **CORPORATIONS—ACTS OF DEFUNCT CORPORATION ABSOLUTELY VOID AND NOT SUBJECT TO RATIFICATION.** Any acts of its officers in the nature of new business, not looking to a winding up of the affairs of the corporation, were wholly void and could not be ratified by the corporation, notwithstanding Comp. Laws 1917, section 870. (Page 400.)
4. **CORPORATIONS—CORPORATION FORFEITING CHARTER NOT DE JURE OR DE FACTO.** It was then civilly dead, and was neither a de jure nor a de facto corporation, and had no power except to wind up its affairs under Comp. Laws 1917, section 870. (Page 400.)
5. **CORPORATIONS—COULD NOT PURCHASE CORPORATE STOCK OF ANOTHER CORPORATION AFTER FORFEITURE OF CHARTER.** Acts of officers of the corporation in subsequently purchasing corporate stock of another corporation were absolutely void, such acts not looking to the assembling of its assets or the winding up of the business under Comp. Laws 1917, section 870, especially where such corporation, while existent, had no authority or power to purchase corporate stock.<sup>1</sup> (Page 401.)
6. **CORPORATIONS—WORLD MUST TAKE NOTICE OF GOVERNOR'S PROCLAMATION OF FORFEITURE OF CHARTER.** A proclamation of the Governor of the state to forfeit the charter of a corporation because it failed to pay the state license tax was notice to all the world that thereafter, unless reinstated within the time by law provided, the corporation had no right and no power to engage in any business whatever, except such as would be necessary for the purpose of winding up its affairs. (Page 401.)

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<sup>1</sup> *Henriod v. East Tintic Development Co.*, 52 Utah, 245, 173 Pac. 134.

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Appeal from District Court, Fourth District, Utah County;  
*A. B. Morgan*, Judge.

Action by Otho S. Houston and another against the Utah Lake Land, Water & Power Company and others, in which A. F. Starr and others intervene. Otho S. Houston dying after action was brought, his widow, Elizabeth Houston, as executrix of his last will and testament, intervened.

Judgment for defendants, and plaintiffs and the interveners appeal.

**AFFIRMED.**

*James Ingebretsen*, of Salt Lake City, *M. J. Moore*, of Los Angeles, Cal., and *M. R. Straw*, of Provo, for plaintiffs appellants.

*Booth & Booth*, of Provo, for intervening appellants.

*Wedgwood, Irvine & Thurman* and *Walton & Walton*, all of Salt Lake City, for respondents.

**WEBER, J.**

Plaintiffs and interveners, designated appellants here, have appealed from a judgment in favor of defendants. Appellants sought to foreclose certain mortgages upon the property of the Utah Lake Land, Water & Power Company, one of the defendants. The Utah Lake Land, Water & Power Company, hereinafter termed respondent, was incorporated in 1907 under the laws of Utah. It failed to pay the Utah state corporation license tax for the year 1914, and, pursuant to law, its right to do business was annulled and its charter was forfeited in 1915. Thereafter, in March, 1916, after its charter had been forfeited, the defunct corporation obtained control of the capital stock of the Los Angeles Mortgage Company, a California corporation, exchanging for the shares of stock

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notes executed by respondent, which also executed mortgages on its property to secure the notes. The following abridgment of the pleadings and proceedings in the case to the time of trial is taken from appellants' brief:

"As appears from the original and first amended complaint, this suit was brought to enforce payment of and to foreclose two of the notes and mortgages, but in connection therewith the plaintiff's sought for and obtained the appointment of a receiver upon several grounds, among others, forfeiture of the company's charter under the state license tax, waste and mismanagement, and insolvency. The corporation appeared, and both by demurrer and answer challenged the validity of the notes and mortgages upon the grounds that they were not authorized corporate acts, and that they were executed at a time when the company's right to do business and its charter had been annulled. The first answer asserts that the obligations are void and not binding upon the corporation, both because the officer who acted was without authority in the premises, and because the corporation was in fact, under the license tax statute, nonexistent.

"The answer contains also a counterclaim under which the defendant charges the vendors of the stock with deceit with respect to the sale thereof, alleging that the stock as bought should have been worth about \$75,000, but was actually worth much less, so that the defendant sustained damages in the sum of about \$42,000.

"Upon the original and first amended complaint, and after an order overruling the demurrer and upon the answer of the defendants and a hearing had, the court appointed a receiver. After the appointment of the receiver and prior to the hearing on the merits the plaintiff Houston died, and his widow, as executrix, was substituted. Upon and in connection with this substitution she filed a complaint in intervention, setting up her note and mortgage, and praying for the enforcement thereof in the usual form. Two other owners of stock in the Los Angeles Mortgage Company, Messrs. Gore and Starr, sold their stock to the defendant at the same time and under the same circumstances in the same transaction as the plaintiffs, and they also, as interveners, set up and sought the enforcement of their notes and mortgages.

"At the hearing the plaintiff Loy filed another amended complaint. This preserves the essential features of both the original and first amended complaint, but sets up the Loy note and mortgage and asks for its enforcement with greater certainty and clearness than in either of the original pleadings.

"The defendants filed separate answers to the Houston intervention and the Loy amended complaint. In legal effect, however, they are substantially the same. The defendants filed separate an-

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swers to the Gore and Starr interventions. These are not the same in fact or in legal effect as the answers filed to the Houston and Loy complaint, but in view of the proof actually received and the objections and rulings at the trial practically the same issues were raised in the Gore and Starr interventions as upon the other pleadings.

"The intervenor Houston and plaintiff Loy filed replies. The defenses raised by the answers are in substance that, since the charter of the defendant corporation had been forfeited, it had ceased to exist, and could not act by an officer nor transact any business; that in any event the officer who assumed to act for the defendant corporation was not authorized and the transaction was not conducted or the papers executed in accordance with law; and, furthermore, that the purchase of stock in a foreign corporation was not authorized under the purpose clause of the corporation, and the note and mortgage executed as the purchase price of this stock was therefore ultra vires and void. These were the material defenses, although stated at length and in connection with some collateral and incidental matters. These defenses are reiterated in objections to the introduction of evidence.

"The replies in substance proceed upon the theory and allege that, if the charter was forfeited, or if the officer who acted was not duly authorized, or if the act was beyond the purpose clause, nevertheless the right to plead these defenses had been waived because of the failure of the corporation to rescind and because of its acts exercising ownership over and enjoying the benefits from the property received from the transaction, and also because the corporation had affirmed the contract, in place of rescinding it, by founding a claim for damages thereon both in its first answer in this suit and in an independent suit brought in Los Angeles; also that the transaction had been ratified by a long course of conduct inconsistent with disaffirmance such as the foregoing, and also because, the contract having been fully executed, and it being impossible to restore the plaintiff and intervenors to their original position, and because of the full enjoyment by the corporation of the fruits of the transaction, the corporation would be estopped to plead any of the defenses asserted; also that the transaction was for the purpose of winding up the company, and thus authorized under the statute extending the life of forfeited charter corporations.

"At the trial all appellants offered in evidence the several notes and mortgages, first establishing as a preliminary the presidential signature of the corporation, the authenticity of the seal affixed, calling attention to the recitals in the mortgage that the corporation was an existing concern, and that the president was authorized, offering the resolutions of the board and stockholders empowering the president to conduct practically all business on behalf of the

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company, including the sale and other disposition of all of its assets, the borrowing of money, the execution of notes and mortgages, and the entire minute book showing that up to the last meeting held by the board these resolutions were at practically each meeting affirmed and readopted. This proof, together with other evidence offered, was, upon objection made, excluded, whereupon all parties rested, and the court entered judgment dismissing all the complaints."

Numerous errors based upon exclusion of testimony are assigned, but the only question that need be considered, and which is decisive, is whether a corporation whose charter has been forfeited for the nonpayment of the state corporation license tax in this state may thereafter engage in new business and embark upon new enterprises. The statute (Comp. Laws Utah 1917, section 870 [chapter 10, page 14, Sess. Laws 1913]) provides:

"Any corporation, organized under the laws of the territory or state of Utah, whose franchise has heretofore expired or may hereafter expire by limitation or by forfeiture, may nevertheless continue for the purpose of winding up its affairs; and to effect this purpose may sell or otherwise dispose of real and personal property, sue and be sued, contract, and exercise all other incidental and necessary powers."

It is argued by counsel for appellants that section 870 not only "extends the life of the corporation for the purpose of winding up its affairs," but that it is "a modification of or the creation of a new purpose clause," and that therefore "the question whether the transactions in question are beyond the powers of the corporation must be determined with reference to whether they occurred for the purpose of winding up the company." Mr. Whitney, the president of the Utah company, repeatedly made the statement in his deposition that "the purchase of the stock of the Los Angeles Mortgage Company was done for the purpose of winding up the affairs of the defendant corporation." Mr. Whitney's statement as to the purpose of the various transactions to which he testified is a bare conclusion. The undisputed facts are that a corporation that was dead for all purposes except for winding up its affairs purchased stock in a California corporation, took charge of that corporation, and engaged in a business

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that was beyond the scope of its powers even before its civil death. Instead of winding up the affairs of the company, the testimony of Mr. Whitney indicated an attempt to resuscitate it. The purpose is well shown in the following excerpt from his testimony:

"If this Los Angeles Mortgage Company had been a going institution and a live wire, it was represented to me that I could sell mortgages, and that we could sell out the Utah land; we could get money enough to put the Utah project in shape, such as California people like to have them. They like cement ditches running to every 40, and that costs lots of money, and it was our idea to raise funds by mortgaging the property, building cement ditches, and then putting it on the market and selling it out."

Mr. Whitney, for the respondent, gave to Otho S. Houston, in exchange for stock in the Los Angeles Mortgage Company, a mortgage on respondent's property for \$20,625, gave A. F. Starr a mortgage for the same consideration for \$16,675, and to B. S. Gore, for the same consideration, a mortgage for \$4,275, gave mortgages to the Los Angeles Mortgage Company amounting in all to \$50,000, and a further mortgage to the Los Angeles company for \$200,000. The \$50,000 mortgage was in about 30 or 32 mortgages ranging from \$500 to \$2,000. The \$200,000 mortgage was to be sold by a man by the name of Henderson, and the money used in improving the Utah lands of respondent, building concrete ditches and making other improvements, and then Henderson was to sell and rent the Utah land in forty or eighty-acre tracts. Mr. Whitney further testified:

"I sold bonds belonging to the Los Angeles Mortgage Company after acquiring the stock and realized \$17,000. About \$1,500 in interest has been paid on the notes. I advanced this for the company, and the company owes me. The defendant company owns the stock of the Los Angeles Mortgage Corporation. I had the corporation's seal with me for the purpose of executing papers for the defendant corporation in Los Angeles. In dealing with the plaintiffs I told them that the company had the right to do business and never knew or thought anything about the failure to pay the corporation tax. I was trying to close the company up and calculated to let the company die when I let the corporation tax die. The transaction with Houston and Loy was entered into for the purpose of winding up the company's affairs. I thought through the se-

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curities of the Los Angeles Mortgage Company I could borrow \$40,000 with which I would wind up the affairs of the company. I did not tell Houston and Loy that the corporation tax had not been paid, and I deliberately failed to pay that tax, and I thought I had a right to close up the business. The defendant corporation has everything I received except the bonds that were sold, and for them the corporation received \$17,000 in cash. The stock the said corporation bought gave control over the assets of the Los Angeles Mortgage Company, and through this control the defendant corporation obtained the assets of that company as set out in the exhibits signed by me. I became president of the Los Angeles Mortgage Company, and for the defendant corporation acquired control of that company. The remaining assets of the Los Angeles corporation held by the defendant corporation are worth about \$20,000."

Whatever may have been Mr. Whitney's purpose, his acts were designed and calculated not to wind up the affairs of the company, but to enlarge and extend its field of operation. To contend that these transactions had any tendency to close or wind up the business affairs of the Utah corporation is a mere juggle with words. It is utterly fallacious to say that a corporation by its corporate death is given everlasting corporate life; that a defunct corporation is endowed by law with enlarged and limitless powers, and that it may enter into realms of speculation from which it was excluded while it had full corporate existence. If in this case the corporation could buy the stock of a California corporation and engage in the loan business in California, it could as well engage in banking in Chicago or buy and operate an oil well in Wyoming. If the theory plausibly presented by appellants is tenable, a private corporation in this state desiring to enlarge and extend its powers may have its charter forfeited by failing to pay its annual state corporation license tax and then become a law unto itself, engage in any kind of business that may suit the fancy of its officers, and become a buccaneer on the high seas of finance. Such is not the purpose of the law. The evidence shows that the president of the respondent corporation was in 1911 given power by the board of directors to borrow money and execute notes and mortgages, and it is claimed that under those resolutions, which were never rescinded, he had authority to execute the notes and mortgages sued upon. How an

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authority conferred during the lifetime of a corporation can be invoked as a justification for its acts after its corporate death, and while lingering only for the purpose of being wound up, is a question that is answered by its mere statement. Whatever authority the president of the 1-4 corporation had by virtue of the resolution of the board of directors died with the corporation, and the fact that the officer could do those things necessary to wind up the affairs of the corporation does not justify the assumption that he had the power and authority that may possibly have vested in him before the charter of the corporation was forfeited. In the instant case it is not a question of ultra vires acts, as argued by appellants. An ultra vires act of a corporation is an act beyond the powers of the corporation. It is conceded by appellants that under the purpose clause the purchase of stock in another corporation would be beyond and outside the authorized business of the corporation, and therefore ultra vires. It is contended that, being ultra vires, the acts of the corporation in buying stock in the Los Angeles Mortgage Company could be ratified, and that they were ratified. It is unnecessary to discuss the question as to the effect of ultra vires corporate acts, because in this case the acts of the defunct corporation were more than ultra vires; they were wholly void, and not confirmable, and not a subject of ratification. The civilly dead corporation could not ratify those things that it had no authority and no power to do. It was neither a de jure nor a de facto corporation after the forfeiture of its charter. In 8 Fletcher's Cyc. Corp. section 5572, it is said:

"It is hardly necessary to state that a corporation which has been dissolved cannot continue business as a going concern. This is so, even though a statute continues its existence for a definite or indefinite time to wind up the business."

Referring to a statute providing that a corporation may, after its dissolution, continue for the purpose of winding up its business, the same author, at section 5636, says:

"But such a statute does not authorize it to engage in any new business transactions."

See, also, 7 R. C. L. section 757, page 743.



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Where a corporation's charter is forfeited in this state, it is the duty of the directors, who are trustees for the stockholders and creditors, to assemble its assets, liquidate its indebtedness, and generally conduct its affairs in such manner as will properly expedite the winding up of the corporation's business. No such course was pursued in this case.

*Henriod v. East Tintic Development Co.* 52 Utah 245, 173 Pac. 134, is of no avail to appellants. In that case there was a mortgage upon the property of the corporation, and the board of directors authorized a confession of judgment on the mortgage indebtedness to prevent foreclosure, and after the property of the company was sold to satisfy the indebtedness the board of directors sold the company's equity of redemption, paid off all the outstanding indebtedness of the company, and distributed what remained in their hands among the stockholders who had not forfeited their shares of stock. The corporation did not engage in new business, and the acts of the directors were clearly for the purpose of winding up the affairs of the corporation. Speaking of the failure to pay the corporation tax for the year 1914, the court said:

"By reason of that fact its charter was forfeited in April, 1915, and thereafter it could no longer legally carry on the business for which it was organized."

Nor can those who deal with a defunct corporation and with its trustees say that they were innocent parties to the transaction and were ignorant of the status of the corporation. The proclamation of the Governor of this estate forfeiting the charter of the Utah Lake Land, Water & Power Company in 1915 was notice to all of the world that thereafter, unless reinstated within the time by law provided, that corporation had no right and no power to engage in any business whatever except such as would be necessary for the purpose of winding up its affairs.

The receiver of the defunct corporation has in his possession the shares of stock obtained from appellants; respondent has in its answer tendered the stock to them, and they are entitled to it from the receiver. The record shows that the Utah Lake Land, Water & Power Company received money

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from the treasury of the Los Angeles Mortgage Company, but that company is not a party here. If money was wrongfully transferred from the treasury of the Los Angeles company to the respondent's treasury, that fact makes the California corporation a creditor of defendant corporation, but such facts are not relevant to any issues in this case. Whatever claims the Los Angeles Mortgage Company may have for money had and obtained cannot be adjudicated in this proceeding. That money belongs to the mortgage company, not to plaintiffs and interveners.

Judgment affirmed, with costs to respondents.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

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### HAMBLIN v. STATE BOARD OF LAND COM'RS et al.

No. 3420. Decided December 20, 1919. (187 Pac. 178.)

1. PUBLIC LANDS—REQUIREMENT THAT PREFERENCE RIGHT APPLICATION FOR PURCHASE OF SCHOOL LAND "MUST" BE MADE WITHIN NINETY DAYS OF FILING OF PLAT NOT MANDATORY. Failure of occupant of school state lands claiming under original settlers to make preference right application to purchase land within ninety days after plat has been filed, under Comp. Laws 1917, section 5588, providing that application "must" be made within such time, does not preclude state board of land commissioners from issuing certificate of sale where no other application has been made between date of filing of plat and making of occupant's application; the word "must" not being mandatory in view of Rev. St. U. S. section 2266. (Page 406.)
2. JUDGMENT—RELIEF TO BE CONSISTENT WITH RULES OF PRACTICE APPLICABLE TO PARTICULAR PROCEEDINGS. Courts must proceed in an orderly manner, and the relief awarded in a given case must be such as is consistent with the rules of practice applicable to the proceedings in which the relief is sought. (Page 407.)
3. MANDAMUS—ISSUANCE OF CERTIFICATE OF SALE TO OCCUPANT OF SCHOOL LAND NOT AN IMPERATIVE DUTY. Under Comp. Laws 1917, section 7391, writ of mandamus will not be granted to compel State Board of Land Commissioners to issue certificate of sale to occupant of school land claiming under original set-

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tlar and applying therefor under section 5588, providing that such occupant "may be permitted to purchase such lands," the issuance of the certificate not being an imperative duty.<sup>1</sup> (Page 408.)

Original mandamus proceeding by Neaf Hamblin against State Board of Land Commissioners and others.

PEREMPTORY WRIT DENIED.

*F. B. Scott*, of Salt Lake City, for plaintiff.

*Dan B. Shields*, Atty. Gen., and *O. C. Dalby*, *James H. Wolfe*, and *Herbert Van Dam, Jr.*, Asst. Attys. Gen., for defendants.

THURMAN, J.

The plaintiff by this proceeding requests the court to issue a peremptory writ of mandate requiring the defendant board, its president and secretary, to issue to plaintiff a certificate of sale for certain school land described in the application. The application is supported by the affidavit of plaintiff's attorney and shows the following facts: That one of plaintiff's predecessors in interest settled upon said land about forty years ago, built a house thereon, lived there, cultivated the land, and raised valuable crops of corn, hay, and pasturage; that another predecessor of plaintiff lived upon and cultivated said land and finally conveyed his interest to plaintiff, who thereafter lived upon the land, cultivated the same, and still continues to live upon and occupy the premises; that a plat of the survey of said land was filed in the local land office February 26, 1918, and in April next following plaintiff instructed his attorney to prepare for him a preference right application and mail it to plaintiff at Kanab, Utah, for his signature; that said application was prepared, according to instructions, by said attorney, and instead of reaching Kanab as expected by

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<sup>1</sup> *Miles v. Wells*, 22 Utah, 55, 61 Pac. 534; *State ex rel. Bishop v. Morehouse et al.*, 38 Utah, 234, 112 Pac. 169.

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plaintiff it was held and retained in the post office at Kanosh, Utah, from May 14 until August 17, 1918; that on failure to receive said application from his said attorney plaintiff caused said attorney to prepare another application, and the same was prepared, signed by plaintiff, and filed in said land office July 9, 1918. Plaintiff's affidavit further shows that in the ordinary course of mail the first application prepared by his attorney would have reached Kanab in time to be signed by plaintiff, returned, and filed in the office of the defendant board, within the time required by law. The affidavit also shows that plaintiff, at the time of filing his preference right application as above stated, deposited with the defendant board the sum required by law as a first payment. and that at said time there was no other application pending for the purchase of the land.

Defendant board, answering said affidavit, admits substantially all the facts alleged, but denies the power of defendant to comply with the demand. It also denies that it owes any duty to plaintiff in respect to the land, inasmuch as plaintiff failed to file his preference right application in time as provided in Comp. Laws Utah 1917, section 5588. The answer is, in effect, a general demurrer, and we are disposed to treat it as such in order that the case may be finally disposed of as far as this form of action is concerned.

The section of the statute above referred to reads as follows:

"Actual and bona fide settlers or occupants who have improved unsurveyed state school lands, and were for two years prior to the extension of the United States survey over said lands actual settlers or occupants thereof, or who hold the same, or the possession thereof, by purchase from the original settlers or their assigns, said original settlers having resided upon, occupied, or cultivated said lands for two years prior to the extension of the surveys of the United States over the same, may be permitted to purchase such lands at private sale at the appraised valuation thereof. Applications to make such purchase by said preferred claimants must be made within ninety days after the plats of said surveys have been filed in the United States land office."

In support of its contention that it is without power to grant plaintiff's application for a certificate of sale, defendant

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insists that the word "must," in the last sentence of the section quoted, is mandatory in substance and meaning as well as in form; that plaintiff, having failed to file his preference right application within the time required by law, thereby lost his preference right and now has no better right than any other citizen. On the other hand, the plaintiff contends that the word "must," in the section quoted, is directory merely, and, inasmuch as there was no other application to purchase said land pending at the time he filed his application, the board had power to recognize his preference right and should have done so by accepting his money and issuing to him a certificate of sale.

Both parties display considerable learning in discussing the question as to whether the word "must," as used in the language referred to, is mandatory or directory. We deem it unnecessary in this case to enter upon a metaphysical disquisition concerning the class to which the word belongs. A far more satisfactory solution of the question may be found by resorting to cases wherein the controlling facts and principles are substantially the same, or closely analogous.

United States Revised Statutes 1878, section 2266, relating to pre-emption rights of settlers of the unsurveyed public domain, reads:

"In regard to settlements which are authorized upon unsurveyed lands, the pre-emption claimant shall be in all cases required to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such pre-emption settlement."

It will hardly be contended that there is any material difference in principle in the meaning and effect of the language employed in the section last quoted and that employed in section 5588 of our statute, upon which defendant relies. Indeed, it is fair to presume that our Legislature in the enactment of section 5588 had in mind the congressional enactment above quoted and used it as a model for the accomplishment of a purpose substantially similar. The words "shall be," in the section last quoted, are just as mandatory in form, and apparently just as peremptory in their meaning, as is the word "must" in the Utah statute.

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In construing the section of the act of Congress above quoted, as far as we have been able to ascertain, the courts have uniformly held it to be directory only. The cases in mind have all arisen between conflicting claimants, and where there were no intervening rights as in the case at bar.

In *Lansdale v. Daniels*, 100 U. S. 113, 25 L. Ed. 587, the contest arose between two preemption claimants, both of whom settled upon the land before it was surveyed. The defendant filed his declaratory statement in the land office about two months before the plat of the survey was filed. The plaintiff did not file his declaration until more than two years after. One paragraph of the court's opinion, illustrating its views upon this question, is of sufficient importance to quote at length. After referring to other questions that had been disposed of, the court, at page 117 of 100 U. S. (25 L. Ed. 587), says:

"Suppose that is so, still the defendant insists that he was entitled to the patent because the plaintiff did not file his declaratory statement until more than two years after the plats of the survey of the land were returned into the local offices. Grant that, but it only shows that both parties settled upon the land while it was unsurveyed, and that each was to some extent in fault in filing his declaratory statement, the difference being that the defendant filed his before he had any right to file it under the pre-emption act, which rendered it a nullity, and that the plaintiff did not file the required notice of claim until the time allowed by the amendatory act had expired. Such a notice, if given before the time allowed by law, is a nullity; but the rule is otherwise where it is filed subsequent to the period prescribed by the amendatory act, as in the latter event it is held to be operative and sufficient unless some other person had previously commenced a settlement and given the required notice of claim"—citing authorities.

To the same effect are *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Hollingshead v. Simms*, 51 Cal. 158. See, also, *Poppe v. Athearn*, 42 Cal. 606; *Moore v. Northern Pacific Ry. Co.*, 43 Land Dec. 175.

Our investigation of this question fails to discover any case in conflict with these decisions; nor does there appear to be any logical reason against the doctrine therein 1 announced. There being no application by any one else between the date of filing the plat and the date of plain-

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tiff's preference right application, we are of the opinion the defendant board had power to grant the plaintiff's application and issue to him a certificate of sale, notwithstanding more than ninety days had elapsed after the plat was filed.

But the power of the board to grant the application and issue the certificate, and the power of this court to compel the board to do so by writ of mandamus, presents 2 entirely different questions for our consideration. If this were an equitable proceeding, under the facts disclosed by the record, we would have no hesitancy in granting plaintiff such equitable relief as would be equivalent to the relief he seeks in this proceeding. But courts must proceed in an orderly manner, and the relief awarded in a given case must be such as is consistent with the rules of practice applicable to the proceeding in which the relief is sought. Plaintiff in this case has applied for a writ of mandate, and the nature of the proceeding is such that the relief cannot be obtained if the defendant had any discretion in the matter of refusing to issue the certificate of sale. In 26 Cyc. 157, the author says:

"The purpose of a writ of mandamus is to enforce the performance of a duty, and where a positive official duty is enjoined by law upon any court, board, or officer, and no discretion is given as to the mode or manner of performance, mandamus is the proper remedy to compel its performance."

Again, the same author, at page 162 of the same volume, says:

"The duties which will be enforced by mandamus must be such as are clearly and peremptorily enjoined by law. Where for any reasons the duty to perform the act is doubtful, the obligation is not regarded as imperative, and the applicant will be left to his other remedies. So when the statute prescribing the duty does not clearly and directly create it, the writ will not lie."

And again, at page 155:

"Mandamus cannot be employed as a general rule for the enforcement of equitable rights."

Our own statute, Comp. Laws Utah 1917, section 7391, relating to mandamus, says:

"It may be issued by the Supreme Court, or by a district court or a judge thereof, to any inferior tribunal, corporation, board, or

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person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station."

The doctrine enunciated by Cyc. has been applied by this court in numerous well-considered cases. In *Miles v. Wells*, 22 Utah, 55, at page 65, 61 Pac. 534, at page 537, it is said:

"The court has no jurisdiction to direct, by mandamus, how the discretionary power, in the premises, vested in the board by the statute, shall be exercised."

In *State ex rel. Bishop v. Morehouse et al.*, 38 Utah, 234, 112 Pac. 169, the first and second paragraphs of the syllabus state the principle as follows:

"To authorize a writ of mandamus against a public officer, relator must show a clear right to the performance of the act demanded with the corresponding duty upon the officer to perform such act.

"The action of a public officer which requires the exercise of discretion will not be reviewed by mandamus, unless he is guilty of a clear and willful disregard of duty or acts capriciously or with partiality."

For other Utah cases, see citations under section 7391, *supra*.

Reverting now to section 5588 of the statute, heretofore quoted, it cannot be successfully contended that the duty of the defendant board to issue the certificate is imperatively enjoined by law. Neither can it be said that the duty is clear and unequivocal. In the circumstances detailed in the statute it is said the settler "*may be permitted* to purchase such lands at private sale at the appraised value thereof." (Italics ours.) The language certainly is not mandatory in form. There may be many reasons why the board should not issue a certificate of sale to an applicant even where he complies with the statute by filing his application in time. The preference right application in the present case does not even show that the possession and occupancy of the land by plaintiff and his predecessor in interest have been exclusive. For aught that appears in the record, there may have been others who in the course of time might come forward asserting preference rights and demanding certificates of sale. We are not assuming that such is even probably the case, for no such defense is set up in the answer, but it serves



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to illustrate the proposition that the issuing of a certificate to any particular person is not made by statute an imperative duty on the part of the board. In any event, plaintiff has not placed himself in position to demand the relief prayed for in "this" proceeding. Having failed to do what the statute says he "must" do, he is not in position to compel the board by writ of mandate to do what the statute only says "may be permitted."

Notwithstanding the conclusion arrived at, we have no doubt that, when the defendant becomes acquainted with the views of the court as to its power in the premises, it will, of its own accord, reconsider plaintiff's application and do what is just and proper under all the circumstances of the case.

The peremptory writ of mandate is denied.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

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RICHARDS v. PALACE LAUNDRY CO.

No. 3399. Decided December 24, 1919. (186 Pac. 439.)

1. MUNICIPAL CORPORATIONS—ALL VEHICLES HAVE EQUAL RIGHTS ON STREETS. Comp. Laws 1917, sections 3978, 3985, are merely declaratory of the law of the road; and, in the absence of a regulating ordinance, all vehicles including automobiles and bicycles, have equal rights on the streets. (Page 417.)
2. MUNICIPAL CORPORATIONS—LIABILITY FOR INJURY TO BICYCLE RIDER ON WRONG SIDE OF STREET. Though when street or highway is not used by others one may drive on any part thereof, yet, when a traveler on bicycle passes from the right to the left of the center of the street he loses some of his rights, and may not be heard to complain of the conduct of those who are on the proper side of the street to the same extent as though he also were on the proper side. (Page 417.)
3. MUNICIPAL CORPORATIONS—DRIVER OF AUTOMOBILE MAY ASSUME THAT ONE APPROACHING ON BICYCLE FROM OPPOSITE DIRECTION WILL CONTINUE ON PROPER SIDE OF STREET. Where one operating his vehicle on proper side of the street makes a survey of condition of the street ahead and observes no one coming on his

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side of the street, but sees one coming toward him on the opposite side of the street, he may assume that such person will continue on the opposite side.<sup>1</sup> (Page 418.)

4. **MUNICIPAL CORPORATIONS—CARE OF AUTO DRIVER APPROACHING INTERSECTION.** A greater degree of care is required of driver of automobile in approaching intersections than between street crossings. (Page 418.)
5. **MUNICIPAL CORPORATIONS—DRIVER OF AUTOMOBILE MUST EXERCISE "ORDINARY AND REASONABLE CARE."** The care and vigilance required of one operating an automobile on city streets must always measure up to the standard required by law, which is to exercise "ordinary and reasonable care," which is that degree of care which the circumstances and surroundings require and which is commensurate with the danger that may be encountered. (Page 418.)
6. **MUNICIPAL CORPORATIONS—DRIVER OF AUTOTRUCK NOT REQUIRED TO MAINTAIN LOOKOUT FOR VEHICLES ON OPPOSITE SIDE OF STREETS.** Driver of defendant's autotruck on proper side of street (Comp. Laws 1917, section 3978), and not on or near a crossing, could relax his vigilance, and was not bound to maintain a constant lookout for any one approaching on the opposite side of the street.<sup>2</sup> (Page 419.)
7. **MUNICIPAL CORPORATIONS—ACTS OF NEGLIGENCE OF AUTOMOBILE DRIVER NOT PLEADED CANNOT BE PROVEN.** In action for injuries due to plaintiff being thrown from his bicycle in front of defendant's approaching autotruck, no act of negligence not charged could be legally proven. (Page 420.)
8. **NEGLIGENCE—PRESUMPTION THAT PERILOUS CONDITION WHICH OUGHT TO HAVE BEEN DISCOVERED WAS DISCOVERED.** Where one owing duty to maintain a lookout could in the exercise of ordinary care and vigilance have discovered the perilous situation of plaintiff in time to have averted injury, the law presumes that he saw what he ought to have seen, and actual discovery is not necessary.<sup>3</sup> (Page 422.)
9. **MUNICIPAL CORPORATIONS—PRESUMPTION IS AGAINST BICYCLE RIDER ON WRONG SIDE OF STREET.** While plaintiff thrown from his bicycle to wrong side of street in front of approaching autotruck was not a trespasser, yet the fact that he was on the wrong side of the street when he was injured created a presumption against him. (Page 422.)

<sup>1</sup> *Barker v. Savas*, 52 Utah, 262, 172 Pac. 672.

<sup>2</sup> *Palmer v. Railroad*, 34 Utah, 484, 485, 98 Pac. 689, 16 Ann. Cas. 229.

<sup>3</sup> *Teakle v. Railroad*, 32 Utah, 276, 90 Pac. 402, 10 L. R. A. (N. S.) 486.

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10. **MUNICIPAL CORPORATIONS—DRIVER OF AUTOTRUCK NOT LIABLE UNDER LAST CLEAR CHANCE DOCTRINE.** Since driver of autotruck on proper side of street did not owe plaintiff approaching on a bicycle on opposite side of street the duty of constant lookout, the plaintiff to make out a case under the last clear chance doctrine, must show more than that autotruck could have been stopped or turned aside within a distance of ten to fifteen feet after plaintiff was thrown from his bicycle in front of the truck. (Page 422.)
11. **MUNICIPAL CORPORATIONS—PLAINTIFF THROWN FROM BICYCLE IN FRONT OF APPROACHING AUTOTRUCK NOT ENTITLED TO RECOVER.** In action for injuries due to plaintiff being 'thrown from his bicycle in front of defendant's approaching autotruck, there being a presumption of a clear roadway in favor of driver, plaintiff, to recover under the doctrine of discovered peril, must prove some positive act constituting negligence, and cannot recover on proof alone that, if driver had maintained a constant lookout, he could have discovered plaintiff's peril in time to have avoided the accident. (Page 423.)
12. **MUNICIPAL CORPORATIONS—PLAINTIFF INJURED BY AUTOTRUCK HAD BURDEN OF SHOWING NEGLIGENCE.** In action for injuries due to plaintiff being thrown from his bicycle in front of defendant's approaching autotruck, plaintiff had burden of showing negligence. (Page 423.)
13. **CONSTITUTIONAL LAW—LEGISLATURE NOT COURTS TO REGULATE USE OF AUTOMOBILES.** If more stringent regulations are required for use of motor vehicles on the streets, it is the duty of the Legislature, and not courts, to provide the remedy and to impose the required regulations. (Page 424.)

Appeal from Third District Court, Salt Lake County; *J. Louis Brown*, Judge.

Action by Leo N. Richards against the Palace Laundry Company. Judgment dismissing action, and plaintiff appeals.

**AFFIRMED.**

*Hutchinson & Hutchinson* and *Walton & Walton*, all of Salt Lake City, for appellant.

*M. E. Wilson*, of Salt Lake City, for respondent.

**FRICK, J.**

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The plaintiff brought this action against the defendant, a corporation, to recover damages for personal injuries which he alleges he suffered through its negligence. The plaintiff, after stating the usual matters of inducement, in his complaint, alleges that on the 29th of May, 1917, between the hours of eight and nine o'clock a. m., "plaintiff was riding a bicycle northward on the pavement between the rails of the east street car track on said (State) street, when a certain automobile truck owned and operated by the defendant corporation was being driven southward on said street at or near the said point; that the plaintiff, in order to avoid collision with an automobile passing him from behind, veered slightly to the west when his bicycle wheel caught or slipped on the west rail of the said east street car track and threw him to the pavement immediately in the pathway of the south-bound automobile truck owned and operated by the defendant corporation; that at the time of his fall to the pavement as aforesaid the automobile truck owned and operated by the defendant corporation was distant some twenty-five or thirty feet northward; that the driver of said truck saw plaintiff fall, and knew and appreciated the danger of his position; that the plaintiff made all possible effort to withdraw his body from the pathway of the on-coming automobile truck; that the said automobile truck was driven at the rate of about nine miles per hour, and was under the control of the driver thereof, and the said defendant and its servant and driver in the exercise of ordinary care could have checked the speed of said automobile truck and changed the course thereof so as to have avoided striking and injuring this plaintiff; that the defendant and its servant and driver, well knowing and appreciating the danger to plaintiff, nevertheless carelessly and negligently failed to check the speed of the automobile truck, or to change the course thereof so as to avoid striking and injuring plaintiff, by reason whereof the said automobile truck was driven against and over this plaintiff, severely bruising and crushing his left foot."

In view of the contentions of the parties, as hereinafter disclosed, we have deemed it best to set forth the allegations stating the alleged acts of negligence in full.

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The defendant filed an answer to the complaint, in which it set forth seven affirmative defenses. The only matters that need to be mentioned here, however, are that the defendant denied all acts of negligence, and admitted that the automobile truck was owned and operated by it at the time and place mentioned in the complaint. It averred that the automobile truck was being operated at the time at the rate of about fifteen miles per hour; that the plaintiff was at the time attempting to ride a bicycle at the place mentioned in the complaint; that in making such attempt "the plaintiff fell from his said bicycle and stumbled and fell immediately in front of defendant's automobile"; that the defendant was operating its automobile truck on the right-hand side of the street going south, and that the plaintiff, in attempting to ride said bicycle going north, passed from the usual or right-hand side of the street to the west or left-hand side, where the alleged injury occurred. The defendant also pleaded contributory negligence on the part of plaintiff, setting forth the facts in detail.

The plaintiff produced evidence in support of the allegations of his complaint, and, after he had rested his case, the defendant interposed a motion for nonsuit. The motion was granted by the court, and judgment dismissing the action was entered, from which plaintiff prosecutes this appeal.

The only error assigned, stating it in the language of counsel, is that "the court erred in sustaining defendant's motion for a nonsuit." The ultimate question to be decided, therefore, is, Did the district court err in not submitting the evidence to the jury for their consideration?

The evidence, in substance, shows that on the morning in question plaintiff rode a bicycle on State street between Eighth and Ninth South streets in Salt Lake City; that at the place of the accident State street is paved from curb to curb; that there are two street car tracks on State street, one immediately east and the other immediately west of the center of the street, which tracks are a number of feet apart; that plaintiff was riding his bicycle north on State street and between the rails of the east car track; that an automobile was

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being driven some distance behind plaintiff—the distance is not shown—and, to get out of its way, he says he turned his bicycle to the west, and in doing so one of the bicycle wheels went into the depression or “groove,” as he called it, on the side of the west rail of the east car track, in which groove or depression the flange of the street car wheel runs; that the bicycle wheel, in passing into said groove, caused the bicycle to fall, and plaintiff slipped or fell therefrom to the pavement; that in falling he fell over the center of the street, and his lower limbs extended some distance—he says from one to several feet—over the east rail of the west car track, and that while in that position the front wheel of the autotruck passed over his left foot, crushing it; that while plaintiff was riding northerly between the rails of the car track he saw defendant’s autotruck about 350 or 400 feet, perhaps more, to the north, coming south toward him; that the autotruck was being driven with the west wheels thereof west of the east rail of the west car track and the east wheels thereof east of the east rail. In other words, the autotruck was west of the center or on the right-hand side of the street, with the wheels thereof astride the east rail of the west car track. Plaintiff testified that when he fell on the pavement of the street the autotruck “was twenty-five or thirty-five feet” north of him. He described his position while lying on the car track thus:

“My feet were almost west of my body. My body was to the east, and my feet were to the west.”

He also testified that the autotruck in coming toward him was not turned “either east or west; it seemed to go straight along the position where it was.” At the place of the accident there was a slight downgrade to the south. With respect to the speed the autotruck was going at the time, plaintiff testified:

“Why, he (the driver) was not going at an excessive speed; he was not going what I would call fast. Q. How fast was he going? A. Well, I can’t say just how many miles he was going, only his statement when he came back to me, he said he wasn’t going very fast. He was going about eight or ten miles an hour.”

Plaintiff also testified that in his judgment the truck was traveling at the rate of about nine miles per hour. The evi-

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dence also shows that the street pavement, both east and west of the car tracks, was from twenty to twenty-five feet in width; that there were no vehicles of any kind, either on the east side or on the west side of the car tracks, except the automobile mentioned by the plaintiff, which, however, no other witness saw, and no obstacles of any kind were on the street; that the accident occurred some distance from any street crossing, on a clear morning between eight and nine o'clock; that the street was dry and in good condition throughout its entire width; that when plaintiff fell to the west of the center of the street he was "facing the south"; that the truck was right upon him, and he "had no time to look"; that the driver of the truck, plaintiff says, "seemed to turn to the westward just as he came to me"; that the front wheel of the truck passed over plaintiff's foot, and the rear wheel passed to the west of it, and did not touch it; that if plaintiff's wheel, he says, had not gone into the groove, he would have passed on safely; that when he fell he was not stunned nor hurt, and immediately after he fell he tried to get out of the way of the on-coming truck, and that in doing so he moved eastward, "anywhere from a foot and a half to two or three feet"; that when he fell the truck might only have been twenty feet from him; that in stating the distance it was from him he was merely giving his best judgment. Plaintiff also produced evidence that a truck loaded as was defendant's truck, and going at the rate of speed it was going, could have been stopped in a distance of from ten to twelve feet, and that within that distance it could have been veered or turned to the west a distance of from ten to twelve feet. In respect to the distance that the truck was from plaintiff when he fell he also testified as follows:

"Q. Mr. Richards, you gave a deposition relative to this accident at one time, did you? A. Yes, sir. Q. And in that deposition I will ask you whether or not I propounded the following question, which I am going to read to you: 'And immediately after going down you looked around over your shoulder?' 'Yes, sir,' did you answer? A. Yes, sir. If it is on there I certainly did, yes, sir. 'Q. And you saw this automobile five or six feet from you? A. I should judge it was about that distance.' Did you so answer?

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A. Yes, sir. Q. That was true? A. To the best of my judgment; yes, sir."

The foregoing fairly reflects the substance of the evidence which has any bearing upon how the accident occurred. There is no question respecting the sufficiency of the evidence with regard to the injury, etc.

Plaintiff's counsel very earnestly insist that the court erred in not submitting the evidence to the jury, while defendant's counsel with equal earnestness contend that the ruling of the court in withdrawing the case from the jury was right: (1) Because there is no evidence justifying a finding of negligence on the part of the driver of the autotruck; and (2) if there were such evidence, then the evidence, nevertheless, without conflict, conclusively shows that the plaintiff was guilty of contributory negligence. A mere cursory reading of the allegations of the complaint makes clear that the only issue that is presented is the one whether the driver of the autotruck did, or, in the exercise of due care, ought to have seen plaintiff's peril in time to have avoided the injury. In other words, the only ground upon which plaintiff bases his right to recover in this case is under the doctrine of what is commonly called the last clear chance or discovered peril. The defendant is not charged with having violated any duty of any kind, except in not avoiding the accident after the plaintiff had fallen from his bicycle onto the street pavement, as before stated. While the undisputed facts and circumstances present a case which in many respects is peculiar, if not unique, yet the legal principles upon which the decision must rest are well recognized by the courts. The fact is conceded that the driver of the autotruck was passing on the right-hand side of the street, where, under our statute (Comp. Laws Utah 1917, section 3978), he had a right to drive. It is also clear that in this state motor vehicles have the same rights upon the highways and streets as other vehicles. *Id.* section 3985. In California a statute like ours has been construed to mean that the vehicle or traveler must keep to the right of the center of the street or highway. *Stohlman v. Martin*, 28 Cal. App. 338, 152 Pac. 319. The Supreme Court of Washington has con-



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strued a similar statute to the same effect. *Ballard v. Collins*, 63 Wash. 493, 115 Pac. 1050.

The statute, however, is merely declaratory of "the law of the road"; and, in the absence of a regulating ordinance—and none is alleged or proved in this case—all 1 vehicles, including automobiles and bicycles, have equal rights on the streets. *Wistrom v. Reddick Bros.*, 6 Cal. App. 671, 92 Pac. 1048; *Diehl v. Robberts*, 134 Cal. 164, 66 Pac. 202; Elliott, *Roads and Streets* (3d Ed.) section 1105; *Cook v. Fogarty*, 103 Iowa, 500, 72 N. W. 677, 39 L. R. A. 488; *Babbitt, Motor Vehicles*, section 335.

While in case the street or highway is not used by others one may drive on any part thereof, yet, when a traveler passes from the right to the left of the center of the 2 street he, to say the least, loses some of his rights, and may not be heard to complain of the conduct of those who are on the proper side of the street to the same extent as though he also were on the proper side. In *Presser v. Dougherty*, 239 Pa. 312, 86 Atl. 854, the decision is correctly reflected in the headnote, where the law is stated thus:

"The mere fact that plaintiff collided with the automobile does not raise any presumption of negligence, especially where the plaintiff was riding on the wrong side of the street, and there was no evidence that the automobile was being operated at a dangerous rate of speed."

In *Babbitt, Motor Vehicles*, section 356, it is said:

"A driver on the right-hand side of the road has a right to assume that vehicles coming in the opposite direction will not violate the law of the road."

That is, that they will continue in the direction they are coming on the proper side of the road or street.

In *Ballard v. Collins*, supra, the rule is tersely stated in the following words:

"A person using a street as a highway has the right to presume that the law of the road will be observed."

That is, a person will not pass to the wrong side of the street. To the same effect are *Trout Auto Livery Co. v. People's G. L. & C. Co.*, 168 Ill. App. 56, 4 N. C. C. A., page 11;

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*Mason-Seaman Transp. Co. v. Wineburgh*, 72 Misc. Rep. 398, 130 N. Y. Supp. 178.

While the law imposes the duty on every person who operates a vehicle on the streets, and especially on one who operates a motor vehicle or automobile, to keep a proper lookout ahead (*Barker v. Savas*, 52 Utah 262, 172 Pac. 672, and cases cited), yet where one who is operating his vehicle on the right-hand side of the street makes a survey of the condition of the street ahead of him, and in doing so he observes no one coming on his side of the street, but sees one or more coming towards him on the opposite side of the street, he has the right to assume that such person or persons will continue onward on the opposite side of the street, and not encroach 3 upon his side. Until the contrary is made to appear, it may also be presumed that the driver of any vehicle will perform his duty in maintaining a proper lookout ahead, and that in doing so, if there is no one on his or the right-hand side of the street, but there is a traveler coming on the opposite side of the street at a place where there is no probability whatever that the vehicle of the driver and the vehicle of such traveler will meet, much less collide, the driver may act accordingly.

In this case the driver of the autotruck was required to exercise ordinary and reasonable care and vigilance under the conditions and circumstances surrounding him. 4, 5 The law under certain conditions and circumstances requires greater vigilance and care on the part of the operator of a vehicle, and especially of an automobile, in order to constitute ordinary care and vigilance than under other conditions and circumstances. If one operates an auto vehicle, which is a swift and silently moving machine, in a crowded city street, a high degree of care and vigilance is required, and the driver should not relax that care and vigilance, but keep a constant lookout to prevent collisions with and injury to others. But even in a crowded street a greater degree of care and vigilance is required in approaching intersections and crossings where both pedestrians and vehicles of all kinds have a right to pass both ways than is the case between street

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crossings. The care and vigilance that is required must always measure up to the standard required by law, which is to exercise ordinary and reasonable care under all the circumstances. The exercise of ordinary and reasonable care, therefore, means that degree of care which the circumstances and surroundings require, and which is commensurate with the danger that may be encountered. See Elliott, *Roads and Streets* (3d Ed.) section 1118.

The driver of the autotruck in this case, therefore, in looking down State street ahead of his truck, it may be assumed, saw the plaintiff approaching on his bicycle on the opposite side of the street. In looking down the street, it is but reasonable to assume that he saw no one on his side of the street, since there was no one there to be seen; and, in view of the further fact that he was not on, near to, or approaching a crossing where both vehicles and pedestrians may pass either or both ways, he had a right to relax his vigilance, and was not required to do more than to maintain such a lookout as would prevent his colliding or coming in contact with any one on his side of the street. As we have seen, the law authorized the driver of the autotruck to presume, and therefore to act on the presumption, that neither the plaintiff nor any one else would pass over on to the wrong side of the street, at least not without giving a proper signal or warning. In view of these legal presumptions the driver was not required to keep a constant lookout ahead for the plaintiff or for any one else. It is therefore not true, as plaintiff's counsel insist, that it was the driver's duty to maintain a constant lookout, for three reasons: (1) Because he could rely on what was obvious to him, namely, that there was no one on his side of the street; (2) that if he saw the plaintiff or any one else on the opposite side of the street he had the legal right to assume that he would continue on that side; and (3) if it be said that he was required to maintain a constant lookout for any one passing on his side of the street he, nevertheless, was not required to do that for any one passing on the opposite side. If, therefore, a traveler on the driver's side of the street might, under proper circumstances and conditions, complain of

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his lack of vigilance, yet it does not follow from that fact that one passing from the opposite side of the street to the driver's side could also be heard to complain. Legal rights and duties arise from the legal relationships of the parties. It often happens that while one standing in a particular relationship to an alleged wrongdoer may complain, another standing in a different relation may not do so, although both are in some way connected with the same transaction. The doctrine is illustrated and applied in *Palmer v. Railroad*, 34 Utah, 484, 485, 98 Pac. 689, 16 Ann. Cas. 229. It must be remembered that there is not a scintilla of evidence in this record which tends to prove that the driver of defendant's automobile truck saw the plaintiff fall upon the street, or that he saw him in time to have stopped the truck before passing over his foot, or in time to have steered the auto away from the plaintiff.

In this connection it is important to keep in mind the fact that the right of recovery in this case is entirely based upon the so-called last clear chance doctrine. No other 7 act of negligence is charged, and hence none other could legally have been proved. In view that there is no evidence whatever which tends to prove that the driver of the autotruck actually saw the plaintiff after he fell to the pavement of the street, and in time to have avoided the injury, defendant's counsel earnestly contends that there is a total lack of evidence to prove the only act of negligence charged in the complaint. Counsel contends that in view that it is not shown that the driver of the truck actually saw and discovered plaintiff's peril in time to have avoided injuring him, therefore the defendant is not liable, even upon the doctrine of the last clear chance. While it is true that in case of a trespasser it must be shown that the person who it is alleged caused the injury actually saw the trespasser in his perilous condition in time to have avoided the injury by the exercise of ordinary care (*Teakle v. Railroad*, 32 Utah, 276, 90 Pac. 402, 10 L. R. A. (N. S.) 486; *Id.*, 36 Utah, 29, 102 Pac. 635), yet is that also necessary in a case where the plaintiff was not a trespasser although he may only have had a qualified right to be where he was at the time he was injured? Under such cir-

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cumstances, while the driver of the autotruck, as we have seen, had a right to rely upon the presumption that the plaintiff would continue on the side of the street he was on, and therefore did not owe plaintiff the same measure of duty that he owed to those passing on the driver's side (*Barker v. Savas*, supra), nevertheless, the driver was required to exercise reasonable care under all the circumstances; that is, to keep such a lookout as the conditions surrounding him required. From this it follows that although the plaintiff did not have the same right on the left-hand side of the street in passing northward as had those who were passing southward on the right-hand side of the street, yet he was not a trespasser. He was very much in the same situation that a stranger would be in going onto the premises of one conducting business with the public, where such stranger went onto the premises merely for the purpose of obtaining some information for his own benefit. While under such circumstances the owner of the premises who carried on the business would owe such a stranger the duty of exercising some degree of care for his safety, since the stranger would not be a trespasser, yet he would not owe such stranger the same duty that he would owe to one whom he had specially invited to come onto the premises upon a matter of business, in which he, as the owner of the premises, had a special interest. It is quite true that many courts hold that one cannot be charged with negligence under the last clear chance doctrine unless he actually saw the perilous condition of the plaintiff in time to have avoided injuring him. See 20 R. C. L. page 141, section 116, where the cases following the foregoing rule are in part collated. See, also, *Twitchell v. Thompson*, 78 Or. 285, 153 Pac. 45, and cases cited. Upon the other hand, it is also true that many courts hold that the rule just stated applies only in cases of trespassers, for the reason that as to them the law imposes no duty to keep a lookout. In an exhaustive note to the case of *Bourrett v. Chicago N. W. Ry.*, 36 L. R. A. (N. S.) at page 958, the annotator, in stating the rule applicable to cases where the law imposes the duty of keeping a constant lookout, says:

" \* \* \* The decided tendency, though there is a conflict on the subject, is toward the view that the failure of defendant to dis-

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cover the danger is sufficient to sustain the doctrine, and that the actual discovery of the danger is not necessary, if, *under the circumstances, there was a duty incumbent upon the defendant to discover the danger and the performance of that duty would have enabled the defendant to avert the accident.*" (Italics ours.)

See, also, note to *Bogan v. Carolina C. R. Co.*, 55 L. R. A. 418.

This court is, however, firmly committed to the rule just stated, namely, that in case there is a duty owing to the plaintiff to maintain a lookout, then, if the person 8 charged with causing the injury in the exercise of ordinary care and vigilance could have discovered the perilous situation of the complainant in time to have averted injuring him, the law presumes that the person charged with negligence saw what he ought to have seen, and actual discovery is not necessary. *Teakle v. Railroad*, 32 Utah, 276, 90 Pac. 402, 10 L. R. A. (N. S.) 486; *Id.*, 36 Utah 29, 102 Pac. 635. In view that this court is committed to the rule just stated it is not necessary to review further the great number of cases upon this subject. The rule just stated, however, implies that the circumstances are such that there was something more than a mere qualified duty to maintain a lookout.

In this case, as we have seen, although the plaintiff was not a trespasser, yet the fact that he was on the wrong side of the street when he was injured created a presumption 9 against him. 2 Cooley, Torts (3d Ed.) 1423; *Neal v. Rendall*, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 668. All the authorities are to the same effect. For what is meant by "wrong side of the street," see Babbitt, Motor Vehicles, section 340.

The driver of the autotruck thus having the legal right to presume that the plaintiff would not encroach upon the driver's side of the street, did not owe the plaintiff the 10 duty of a constant lookout, and hence, to hold the defendant liable in this action, the plaintiff, in order to make out a case in law, is required to prove more than the mere fact that the autotruck could have been stopped or turned aside in the distance of ten or fifteen feet. True, the plaintiff testified that in his judgment the autotruck was a distance of from twenty-five to thirty-five feet from him when he fell onto the

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pavement. No one can read his testimony, however, without becoming thoroughly convinced that the distance given by him is a mere estimate. Indeed, it is largely in the nature of a guess or conjecture.

If this case were one, however, where it was the duty of the driver to maintain a constant lookout, as was the case in *Barker v. Savas*, supra, we would, notwithstanding 11, 12 the uncertainty of plaintiff's testimony, feel constrained to hold that the question of whether the driver ought to have seen the plaintiff in time to have avoided the injury was for the jury. Under such circumstances, however, there would have been no presumption of a clear roadway in favor of the driver, as is the case here. Where there is such a presumption the plaintiff must prove more than merely to show that if the driver had maintained a constant lookout he could have discovered his peril in time to have avoided the accident. That principle applies only in cases where the duty to maintain a lookout is constant or continuous. The burden to show negligence was on plaintiff, and no negligence is shown until something is made to appear from which negligence may reasonably be inferred. Is negligence shown where nothing is made to appear except that the driver of the vehicle who was lawfully passing on the right side of the street, and that in doing so came in contact with one who had intruded onto the wrong side of the street, but had done so when the driver was still such a distance away that if he had maintained a constant lookout he could have discovered the plaintiff and have avoided the injury? Clearly not. That might be so where there was no presumption of a clear street in favor of the driver. Where that presumption obtains, as in this case, however, the plaintiff must prove some positive act or omission constituting negligence. That is, a failure to perform some duty imposed by law. If the plaintiff had thus shown that the driver was such a distance away that notwithstanding the presumption in his favor he, nevertheless, should have looked, or that his conduct in operating the truck was such from which negligence could be inferred, the case would be different. The presumption, however, was in favor of the driver,

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and until it is overcome by competent evidence plaintiff was not entitled to recover as matter of law.

To permit a recovery under the undisputed facts and circumstances of this case, or to permit a jury to find against the defendant, would, to say the least, be tantamount to permitting the plaintiff to penalize the defendant on account of plaintiff's own misfortune. The defendant is entitled to the protection that the law affords it in using the streets. This right it has the same as any one else using the streets, and it is our duty to protect it in the exercise of that right. That can only be done by enforcing the law and legal presumptions as they exist. If more stringent regulations are required with respect to the use of automobiles or motor vehicles on the streets, it is not only the province, but the duty, of the legislative power, and not of courts, to provide the remedy and to impose the required regulations.

In disposing of this case we have not considered the question of contributory negligence urged by the defendant on the part of the plaintiff in so operating his bicycle as to force the wheel thereof into the groove next to the rail on the street car track. In view of the conclusion reached that question becomes immaterial, and hence we express no opinion upon it.

From what has been said, it follows that the judgment of the district court is right, and therefore should be, and it accordingly is affirmed, with costs.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

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THOMAS v. JOHNSON.

No. 3385. December 30, 1919. (186 Pac. 437.)

1. **VENDOR AND PURCHASER—TENDER OF PRICE NOT REQUIRED WHERE VENDOR REPUDIATES CONTRACT.** Under an option for the sale of land providing that, if the optionee should offer to comply with the terms of payment, the optionor would convey and furnish an abstract, a tender of the price by the optionee was un-



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- necessary where he offered to proceed with the agreement, and the optionor, instead of furnishing an abstract, repudiated the contract and said there was no contract.<sup>1</sup> (Page 428.)
2. **VENDOR AND PURCHASER—NOMINAL CONSIDERATION FOR OPTION SUFFICIENT.** One dollar is an adequate consideration for an option to purchase land if the consideration for the purchase of the land is adequate. (Page 429.)
  3. **SPECIFIC PERFORMANCE—OPTION SUFFICIENTLY DEFINITE REGARDING TIME OF PAYMENT.** An option to purchase land providing that one-fourth of the price should be paid in cash, one-fourth on or before a specified date, and "balance ten years time at eight per cent, per annum," was sufficiently definite as to the time of payment of principal and interest to justify specific performance. (Page 429.)
  4. **SPECIFIC PERFORMANCE—OPTION NOT FATALY UNCERTAIN.** An option to purchase land providing for the transfer of title subject only to such liens and incumbrances as were to be assumed implied some form of security, and was not too indefinite to be specifically enforced in the absence of any showing that the security contemplated was inadequate. (Page 429.)

Appeal from District Court, Fourth District, Utah County;  
*A. B. Morgan*, Judge.

Action by P. P. Thomas against Lars A. Johnson. From a judgment for defendant, plaintiff appeals.

REVERSED, with directions.

*Elias Hansen*, of Spanish Fork, for appellant.

*Dickson, Ellis, Lucas & Adamson*, of Salt Lake City, and  
*M. R. Straw*, of Provo, for respondent.

WEBER, J.

On April 13, 1917, the defendant, Lars A. Johnson, who is the respondent here, gave to P. P. Thomas, appellant, a writ-

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<sup>1</sup> *Pool v. Motter*, 55 Utah, 288, 185 Pac. 714; *Cummings v. Nielson*, 42 Utah, 169, 129 Pac. 619; *Obrecht v. Land & Water Co.*, 44 Utah, 270, 140 Pac. 117.

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ten option for the purchase of certain land in Utah county. The material portions of the option read as follows:

"In consideration of \$1.00 paid to me by P. P. Thomas, the receipt of which is hereby acknowledged, and for other valuable considerations, Lars A. Johnson, the undersigned, hereby gives and grants to P. P. Thomas and his assigns, the exclusive right to purchase at his or their option, the following described property: (Describing the property)—for the sum of \$6,500.00, less the amount paid for this option. The terms of the payment to be as follows:  $\frac{1}{4}$  cash,  $\frac{1}{4}$  on or before December 15, 1917, balance 10 years' time at 8 per cent. per annum. \* \* \*

"And if the said P. P. Thomas \* \* \* shall comply or offer to comply with the terms of payment above specified, or any other terms which I may hereafter agree to accept, I agree to convey and transfer said property to said P. P. Thomas or such grantee as he might designate, by warranty deed signed by myself and my wife, and any other person then having any estate in said land and to furnish at my expense a certified abstract, showing a marketable title vesting in the grantor to be named in said deed at the date of transfer, subject only to such liens and incumbrances as are under the terms of payment to be assumed by the grantee, and in case said title shall be defective in any way, I agree to perfect the same at my expense. It is understood that this option may be exercised by P. P. Thomas or his assigns at any time on or before thirty-seven days from the date hereof, or at any time thereafter and before ten days' written notice of intention to terminate shall have been given."

Suit was later brought by appellant in the district court of Utah county for the specific enforcement of the contract above set forth, and issues were joined by the parties to the suit. At the trial an advisory jury was impaneled. After producing testimony as to the execution and delivery of the option contract, and after placing the contract in evidence, appellant testified that he met Johnson, the respondent, at the latter's farm on May 19, 1917. Regarding a conversation between them at that time and place, Thomas testified:

"I said I was ready to make the payment, and that, if he would go with me to a place of a notary public and fix up the papers, I was ready to go through with my part of the deal. \* \* \* I stated that I was ready to make payment of the portion that was due according to the contract. Johnson stated that he refused to let me have that land; that he did not consider there was a contract. I said I was ready and willing to pay."

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When the witness was asked whether he had the money to pay, he stated he had it in the bank. A question as to which bank he had his money in was objected to as incompetent, irrelevant, and immaterial, and the court held that an actual tender of the first installment on the purchase price was necessary under the contract; that one-fourth of the purchase price must, under the contract, be offered in actual cash within thirty-seven days from the date of the contract. To this ruling an exception was duly taken. Thomas further testified that, in company with others, he saw Johnson on November 2, 1917, and he was then asked by his counsel to state what occurred at that time. The question was objected to as incompetent and irrelevant, and as referring to a written offer made November 2, 1917, and being under paragraphs 3 and 7 of the complaint. The paragraphs of the complaint referred to in the objection are in substance as follows: That the defendant (Johnson) failed to furnish the abstract for the property as he had agreed, and on November 2, 1917, the plaintiff served upon defendant a written notice to the effect that plaintiff accepted the option to purchase, and that he was ready to proceed with the deal and make the first payment provided for in the option contract; that at the said time and place plaintiff tendered to and attempted to give to the defendant as the first payment the sum of \$1,625, which money the defendant refused to accept; that the defendant on said date refused to perform his part of the contract, and has ever since refused, failed, and neglected to perform, although the plaintiff has at all times been, and now is ready, willing, and able to pay the money provided for under the terms and conditions of said contract; and that the plaintiff offered and tendered into court the sum of \$3,250, the same being one-half the purchase price of said land, and asks to be allowed to pay said sum into court to be applied upon the purchase price of the said land upon the defendant's compliance with the terms and conditions of the contract.

The objection was sustained by the court and exception reserved. It was then stipulated in open court:

"That Elias Hansen, who on the 19th day of May, 1917, was the

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attorney for P. P. Thomas, and who accompanied P. P. Thomas at the time the written offer was made, talked with Mr. Lars A. Johnson and requested that he comply with the contract, and that Lars A. Johnson told Elias Hansen at that time that he would not and could not convey this property, because his brother, John Johnson, had an interest in the property, and that he, John Johnson, would not consent to this contract, and that R. L. Howard would testify, if permitted, that on April 13, 1917, at the time the alleged option was made, Lars A. Johnson stated to P. P. Thomas, in the presence of R. L. Howard, that he was the absolute owner of the 100 acres."

The jury was then discharged, and the court ordered the cause dismissed.

The court did not determine the issue of fact as to whether or not the respondent ever made, executed, and delivered the option contract. Among other findings, the court found that the respondent never tendered performance to appellant, and that appellant accepted and acquiesced in respondent's renunciation of the contract. Two questions are therefore raised by this appeal: (1) Was it necessary for appellant to make an actual and physical tender of the first payment on the contract? (2) After the option contract was renounced by respondent was the renunciation ratified by appellant?

It will be observed that, according to the undisputed evidence, appellant offered to comply with the terms of the contract, and that respondent then and there de- 1  
nied the existence of the alleged contract. Appellant did exactly that for which the contract provided. The proper course for the parties to pursue was for appellant to express his willingness and readiness to proceed with the agreement, or, in the language of the contract, to "comply or offer to comply with the terms of payment above specified," and it then became the duty of respondent to furnish an abstract of title, and, upon receiving the abstract of title, the payment of the purchase money and delivery of the deed were to be concurrent. Why should appellant have made an actual tender of the first installment of the purchase money when Johnson had furnished no abstract of title to his land and had repudiated his contract and stated there was no contract? After that announcement by Johnson, a tender by the appellant would have been an idle ceremony. The law never compels a

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person to do that which is vain or useless. *Pool v. Motter*, 55 Utah 288, 185 Pac. 714, decided this term; *Cummings et ux. v. Nielson et al.*, 42 Utah, 169, 129 Pac. 619; *Obrecht v. Land & Water Co.*, 44 Utah, 270, 140 Pac. 117.

The court's finding that the renunciation of the contract was assented to and ratified by appellant is unsupported by any evidence. It may be that upon a full hearing such a conclusion would be proper, but under the present meager and fragmentary record it is not justified.

Other questions are discussed in the briefs of counsel. These were not raised in the trial court, but, as the cause will probably be tried again, we shall briefly refer to them.

It is contended by respondent that one dollar is an inadequate consideration for the option; that to tie up land worth \$6,000 for the time provided for in the option is an inequity so manifest, so strong, and so gross as to shock the conscience of the chancellor.

According to the weight of authority, a nominal consideration for an option is sufficient. *Miller v. Kimmel* (Okl.) 184 Pac. 762; *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 523; 25 R. C. L. section 37, page 237; James, *Option Contracts*, section 326.

If the consideration for the purchase of the property is adequate, the consideration for the option to purchase, however small, is binding. To hold otherwise would be to destroy the efficacy of contracts that are made daily in the course of real estate, mining, and other business pursuits. *Mathews Slate Co. v. New Empire Co.* (C. C.) 122 Fed. 972.

It is urged by respondent's counsel that the contract is so vague and uncertain regarding the deferred payments that appellant is not entitled to specific performance. 3, 4 It is expressly stated in the contract when the balance of the purchase price shall be payable, and that is in ten years from date. The time of payment of interest is sufficiently definite. While no security is specified, the contract says that the title to be transferred shall be "subject only to such liens and incumbrances as are under the terms of payment to be assumed by grantee." In construing the meaning

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Bracken et al. v. Chadburn et al., 55 Utah 430.

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and effect of the option contract, we have no right to assume that the words just quoted shall have no meaning or effect. They evidently mean either that liens or incumbrances on the property were in existence at the very time the option was executed or that such liens or incumbrances might be placed thereon by respondent before or at the time of making the deed. In any event the words quoted certainly contemplate some form of security, and if the security contemplated was so inadequate as to render the transaction inequitable and unenforceable, it was incumbent upon respondent to establish the fact to the satisfaction of the court. Inadequacy of security is not made an issue in the pleadings; the evidence offered by appellant does not disclose it. Under these circumstances it was manifestly unfair to appellant to dismiss the action without hearing all the evidence.

For the reason that the record shows that respondent renounced and repudiated the contract, and thereby waived any tender, if the same was required under the contract, at the time appellant offered compliance with its terms, and because the record does not contain any evidence to establish that appellant acquiesced in respondent's renunciation of the option, judgment is reversed, and the district court is directed to vacate its findings of fact and conclusions of law and grant a new trial. Costs of appeal to appellant.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

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BRACKEN et al. v. CHADBURN et al.

No. 3394. Decided December 30, 1919. (185 Pac. 1021.)

1. **APPEAL AND ERROR—IN EQUITY SUIT SUPREME COURT HAS DUTY TO REVIEW EVIDENCE.** In an equity proceeding, as for decree adjudging plaintiffs to be owners of a water filing, quieting title thereto as against defendants, and annulling an alleged sale or assignment thereof, it is the duty of the Supreme Court to review the evidence and determine whether the findings of

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the lower court are supported by the weight of the testimony. (Page 435.)

2. **FRAUDS, STATUTE OF—RIGHT OF ALL CONCERNED TO WATER FILING MADE BY SINGLE PARTY UNDER ORAL AGREEMENT.** Where plaintiffs complied with their part of an oral agreement as to the construction of an irrigation canal, paid over their pro rata share of the cost of a water filing made by a defendant, and did their full duty in constructing the canal, took their water through it, and, by a water master elected annually, in which election defendant participated, distributed to him his share of the water, as well as the shares of the other owners, plaintiffs are entitled to a decree adjudging them to be owners of the water filing made in the state engineer's office by defendant alone, and to decree quieting title thereto against defendant and his successors; the statute of frauds not being invocable to defeat plaintiffs' rights.<sup>1</sup> (Page 436.)
3. **WATERS AND WATER COURSES—EVIDENCE SUPPORTING JUDGMENT DETERMINING OWNERSHIP OF WATER FILING.** In suit for decree adjudging plaintiffs to be the owners of a water filing made by an individual defendant, and quieting title thereto against him and his successor, the corporate defendant, also annulling the individual defendant's assignment of the filing to the corporate defendant, evidence *held* to support finding that the corporate defendant had notice of plaintiffs' interest in the water filing.<sup>2</sup> (Page 437.)
4. **WATERS AND WATER COURSES—ASSIGNEE OF WATER FILING WITH NOTICE TOOK SUBJECT TO ADVERSE RIGHTS.** A reclamation company, which accepted assignment of a water filing with notice of an adverse interest therein, took subject to all the equities and rights of the adverse parties. (Page 437.)

Appeal from District Court of Washington County, Fifth District; *H. N. Hayes*, Judge.

Action by Wallace Bracken and others against James W. Chadburn and the New Castle Reclamation Company.

From judgment for plaintiffs, defendants appeal.

**AFFIRMED.**

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<sup>1</sup> *Lynch v. Coviglio*, 17 Utah, 106, 53 Pac. 983.

<sup>2</sup> *Toland v. Corey*, 6 Utah, 392, 24 Pac. 190; *Live Stock Co. v. Dixon*, 10 Utah, 334, 37 Pac. 573; *Shafer v. Killpack*, 53 Utah, 468, 173 Pac. 948.

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Bracken et al. v. Chadburn et al., 55 Utah 430.

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*Bagley & Ashton*, of Salt Lake City, and *E. H. Ryan*, of Cedar City, for appellants.

*Hancock & Barnes*, of Salt Lake City, and *Geo. R. Lund*, of St. George, for respondents.

GIDEON, J.

The plaintiffs asked for a decree adjudging them to be the owners of a certain water filing made in the state engineer's office by defendant J. W. Chadburn, known as filing No. 1663; also for a decree quieting title thereto against the defendants and annulling an alleged sale or assignment of such filing by the defendant Chadburn to his codefendant, the New Castle Reclamation Company. Denial of any interest in the said water or water filing in the plaintiffs was made by the defendants. The further defense is interposed that the oral contract set out in the complaint is within the statute of frauds, and is therefore not enforceable. Plaintiffs had judgment. Defendants appeal.

The application was for ten second feet of the high or flood waters of Santa Clara river. It appears from the record that Santa Clara river runs through Washington county in this state in a southwesterly direction. The stream has its source in the mountains. During the early spring a large volume of flood or high waters from the melting snows runs down the stream. The lands along the entire course of the stream are barren and unproductive without irrigation. In the valleys along the stream are located small communities engaged chiefly in farming and stock raising. Near the source of the stream is a village known as Pine Valley. Some eight or ten miles down the river from Pine Valley is a small village known as Central, also referred to in the record as Eight-Mile Flat. Some of the plaintiffs, at the time of beginning the construction of the canal out of which this controversy arose, resided in Pine Valley and owned lands, and used for irrigation thereon water from that river. The water so used was known as primary water, and was superior to the rights in-



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volved in the filing made by Chadburn. In the year 1907, or immediately prior thereto, the plaintiffs and their predecessors in interest began jointly the construction of a canal having its diversion point on the said river some two or three miles up the stream from the town of Central. The canal extends along the bench lands or foothills of the mountains some five or six miles and was constructed to carry water to the lands owned by plaintiffs. Those lands were, however, barren at the date of the construction of the canal. It is apparent that at the date mentioned plaintiffs intended to use the canal, at least partially, for diverting part of the primary water owned by them theretofore used in irrigating lands located in Pine Valley. In the month of November, 1907, Chadburn, in his own name, filed an application in the state engineer's office for the appropriation of ten second feet of the flood or high waters of the said Santa Clara river, and designated the place of diversion to be the same as the one selected by plaintiffs to divert water into their canal, and also described certain lands located in sections 10 and 11 as the lands to be irrigated. Both plaintiffs and defendant Chadburn were in possession of lands situated in those sections. Some months after filing this application protests were made by communities or irrigation districts located farther down the stream against the granting by the state engineer of any water right to Chadburn under his said application. It appears that the defendant Chadburn was not able to construct the canal to convey the water to the lands described in the application. Neither had he the necessary means to contest the protests filed against his application. Nor did he own or control the land to be irrigated. During 1907 and 1908 some negotiations were had, and an arrangement was consummated by which the plaintiffs and the defendant Chadburn as a company—and they designated themselves as the Central Canal Company—had prepared the necessary answers to the protests, and thereafter continued with the construction of the canal. It also seems that during that time the defendant Chadburn contributed his pro rata share of the expense and work in constructing the canal. The first water, as established by the

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great weight of the evidence, was turned into the canal on or about January 1, 1908. During the years immediately following a relatively small amount of land was cleared of sagebrush and other growth, so that the same could be cultivated, and not very much water was carried through the canal. At that time sixteen men were interested in the canal. The undisputed testimony is that each of these sixteen men owned an undivided one-sixteenth interest in the canal and the water taken through the canal under the filing made by Chadburn. It is evident that other and additional water—that is, some of the primary water which prior to 1908 had been used on the lands in Pine Valley—was carried through this ditch, and used for irrigating lands belonging to the owners of that primary water, but the water taken through the ditch under the application was divided equally among the sixteen claimants. No written agreement by which the defendant Chadburn agreed to sell or assign this water right to the plaintiffs seems to have been made until 1912. The lower court found that in the early part of 1912, at a meeting called for that purpose, Chadburn requested that he be given or allowed additional water under the claim that he was not able to mature his crops with the water that he had been receiving. The court also found that at this meeting a new agreement was made between the parties, and that the agreement thus made was reduced to writing and signed by all of the parties there present, including the defendant Chadburn. The purport of the agreement was that, in consideration of the defendant Chadburn turning over to the plaintiffs his rights under the water filing, and upon the payment by him of an additional sum of money the water should be divided into seventeen equal parts, and that of those seventeen parts he and his brother were to have two. Thereafter the water was divided into seventeen parts, and defendant Chadburn and his brother received two-seventeenths. This state of affairs continued, and all of the parties received their pro rata share of water. The canal was enlarged from year to year until 1914, when the defendant Chadburn sold his interest in the canal and the land owned by him under it, and moved from the

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neighborhood. Nothing further, apparently, was done or said by the defendant Chadburn until the early part of 1916, when he entered into an agreement with and made an assignment of the water filing to his codefendant, the New Castle Reclamation Company, a corporation.

The appellants contend: (1) The court's finding that there had been a completed transaction or sale of the defendant Chadburn's right in the water filing to these plaintiffs is not supported by, but is contrary to, the evidence; (2) there is insufficient evidence to support the court's finding that there was a written agreement made between defendant Chadburn and plaintiffs in 1912; (3) the defendant, the New Castle Reclamation Company was an innocent purchaser, without notice, for a valuable consideration, and the court's finding that it took the assignment with notice of plaintiff's equity is not supported by the evidence.

This being a proceeding in equity, it is the duty of this court to review the evidence and determine whether the findings of the lower court are supported by the weight 1  
of the testimony.

Certain facts relating to the matters in controversy are not disputed, or are so firmly established by the evidence as to be admitted, and are here stated. Some agreement was had between the plaintiffs or their predecessors in interest and defendant Chadburn, by whose terms the water filing was to become the joint property of the sixteen landowners, including the defendant Chadburn. The plaintiffs paid to the defendant Chadburn their pro rata share of the initial cost of filing the application in the engineer's office. The plaintiffs and defendant Chadburn, with the assistance of one J. X. Gardner, employed for the purpose, in 1908, jointly prepared the answer made to the protests against allowing the filing. Every act of the defendant Chadburn from 1908 until 1916 spells but one thing, namely, that he recognized the joint ownership of the water filing between himself and the plaintiffs or their predecessors in interest. The canal was constructed by the joint labor of all. Each contributed proportionately, either in money or work, his share of the expense of construct-

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ing, enlarging, and repairing the canal from year to year. All, including the defendant Chadburn, were given each year during the season of high water the amount of water in the canal represented by their pro rata interests.

Although the defendant Chadburn was present during the entire hearing in the district court, he gave no testimony in denial or explanation of the mass of testimony presented by plaintiffs to establish the facts as herein stated and as found by the lower court. He did precisely what might be expected of a man who would deliberately betray a trust reposed in him by his neighbors. He brought his wife into court, and had her testify in denial of certain statements made by plaintiffs' witnesses upon a matter immaterial to the main issue, and only with a view of discrediting one or two of plaintiffs' witnesses.

A court of equity can and should grant relief under the state of facts presented by this case. Whatever doubt there may be under the testimony respecting the written agreement or memorandum signed by the defendant Chadburn in 1912, there can be no doubt that the rights of the plaintiffs in the water filing and the water appropriated thereunder had been acquired long prior to that date. Plaintiffs had fully complied with their part of the agreement. They had paid their pro rata share of the cost of the filing, had done their full duty in constructing the canal, had taken their water through the canal, and a water master, elected annually, in which election the defendant Chadburn participated, distributed to him his pro rata share of the water, as well as the pro rata shares to the other owners. The plaintiffs had redeemed the barren, uncultivated lands, and, by means of the water taken through this canal had caused the valley to bring forth bounteous crops. They had constructed homes and other buildings upon the lands made habitable by the water 2 from this canal. Where the lizard and the prairie dog had lived their wild unhampered lives the Shorthorn and the Berkshire now fatten upon alfalfa grown and matured by the water diverted through this canal and claimed by reason of the filing made by the defendant Chadburn.

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The statute of frauds cannot be invoked to defeat plaintiffs' rights under a state of facts as shown by this record. Whatever may have been the various and devious interpretations given by the courts to Statute 29 Charles II, it has never been construed to be an instrument of fraud; and such would be the effect if the defendant Chadburn were permitted to successfully invoke it in this action.

The rule of law applicable to the state of facts as shown by this record is well stated in the following quotation taken from *Gallagher v. Gallagher*, 31 W. Va. 9, 13, 5 S. E. 297, 299, and adopted with approval in 36 Cyc. 644:

"The fraud which will entitle the purchaser to a specific performance is that which consists in setting up the statute against the performance after the purchaser has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case the vendor is held by force of his acts or silent acquiescence, which have misled the purchaser to his harm, to be estopped from setting up the statute of frauds."

Such was the holding of this court in *Lynch v. Coviglio*, 17 Utah, 106, 53 Pac. 983. See, also, *Park v. Park*, 45 Colo. 347, 101 Pac. 403; *McLure v. Koen*, 25 Colo. 284, 53 Pac. 1058; *Bree v. Wheeler*, 4 Cal. App. 109, 87 Pac. 255; Kinney, Irrigation, sections 999, 1520.

The third contention of appellants is without merit. The defendant New Castle Reclamation Company owns and operates a canal taking water from the Santa Clara 3, 4 river some eight miles from the canal in controversy. The superintendent or agent of the company, at the time of the alleged purchase of the water rights from defendant Chadburn, was one J. X. Gardner, the same person employed to assist the plaintiffs and defendant Chadburn in the preparation of the answer made to the protests against granting the application in question in the year 1908. The plaintiffs were in the open and continuous possession of the canal and the right to use and control the water running through it

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during the years from 1908 to 1916, the date of the alleged purchase. Moreover, it is undisputed by any evidence on the part of the defendants that in a conversation between counsel for plaintiffs and the secretary of the defendant New Castle Reclamation Company, had at Salt Lake City in February, 1916, the secretary was advised that the plaintiffs owned that water, and that the secretary's reply was:

"Well, we are not worrying about that; we understand fully the condition of that water down there, and we have some time ago entered into a contract with Chadburn to purchase it."

The court's finding that the New Castle Reclamation Company had notice of plaintiff's interest in that water filing is supported by the record. In fact, no other reasonable deduction could be made from the testimony. *Toland v. Corey*, 6 Utah, 392, 24 Pac. 190; *Live Stock Co. v. Dixon*, 10 Utah, 334, 37 Pac. 573; *Shafer v. Killpack*, 53 Utah 468, 173 Pac. 948. Having such notice, that company accepted the assignment subject to all the equities and rights of the plaintiffs. 1 Pomeroy Eq. Jr. (2d Ed.) section 688.

The judgment of the district court was clearly right. It, therefore should be, and it accordingly is, hereby affirmed. Respondents to recover costs.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

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#### NATIONAL REALTY SALES CO. v. EWING et al.

No. 3391. Decided January 7, 1920. (186 Pac. 1103.)

1. EXECUTION—SUBSEQUENT PURCHASER WITH NOTICE OF DEFECTS IN TITLE IS NOT PROTECTED. A subsequent purchaser on execution sale cannot be protected as a bona fide purchaser if he had actual or constructive notice of an unrecorded title, ownership, or interest in the property at any time before payment of the purchase price.<sup>1</sup> (Page 443.)

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<sup>1</sup> *Shafer v. Killpack*, 53 Utah, 468, 173 Pac. 948.

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2. **EXECUTION—POSSESSION OF JUDGMENT DEBTOR'S GRANTEE NOT PUTTING PURCHASER ON NOTICE.** In action to quiet title, against a purchaser of land on execution sale and others, by the judgment debtor's grantee which did not record its conveyance until after the execution sale, evidence for plaintiff *held* insufficient to show possession on its part under its unrecorded conveyance so as to charge third parties or purchasers with notice or to put them on inquiry. (Page 446.)
3. **EXECUTION—CHARACTER OF POSSESSION TO IMPART NOTICE TO PURCHASER OF OCCUPANT'S TITLE.** Possession of realty, to impart notice of the occupant's title and equities to a purchaser on execution sale, must be open, notorious, visible, and continuous. (Page 446.)
4. **EXECUTION—SALE NOT INVALIDATED BY INADEQUACY OF PRICE.** Mere inadequacy of price was not sufficient to invalidate execution sale as against the judgment debtor's grantee, where the proceedings were fair and regular and there is nothing in the record to suggest fraud or concealment. (Page 447.)
5. **EXECUTION—EQUITY WILL NOT AID JUDGMENT DEBTOR'S GRANTEE WHO STOOD BY ON SALE.** Equity will refuse its aid, in action to quiet title, to the grantee from a judgment debtor the day after judgment which did not record its conveyance until after sale of the land on execution, but stood by and permitted such sale with subsequent transfers of title in reliance upon it. (Page 447.)

Appeal from District Court, Fourth District, Utah County;  
*A. B. Morgan*, Judge.

Action by the National Realty Sales Company, a corporation, against *H. J. Ewing* and others. From judgment and decree for defendants, plaintiff appeals.

**AFFIRMED.**

*Hancock & Barnes* and *Tanner & Tanner*, all of Salt Lake City, for appellant.

*R. A. Porter*, of Payson, and *Morris & Callister*, of Salt Lake City, for respondents.

**CORFMAN, C. J.**

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Plaintiff commenced this action to quiet the title to a tract of land alleged to be owned by it in Utah county. The complaint was in the usual form for the quieting of title to real property. The defendants filed separate answers, with the exception of H. J. and Myrtle Ewing, who defaulted. The answers of the defendants were of the same legal effect, denying ownership in the plaintiff and relying upon an execution sale of the lands and premises made by the sheriff of Utah county under a judgment secured in the justice court in and for Salt Lake county, in a case wherein H. J. Ewing was plaintiff and H. S. Tanner et al., doing business as copartners under the name of the Farmers' Loan & Trust Company, were defendants. It is alleged by way of answers of the defendants that an abstract of the judgment in said justice court was filed in the district court for Utah county, and that thereupon an execution issued out of said district court, directed to the sheriff of said county, and that under and by virtue of said execution the sheriff, in conformity with statute, sold said real property to the said judgment creditor, H. J. Ewing, who in due course of time received the said sheriff's deed therefor; that thereafter the said H. J. Ewing sold and conveyed the premises to William J. Finlayson, who thereafter executed a mortgage thereon to the defendant Farmers' & Stockgrowers' Bank to secure a loan made by it to the said Finlayson.

The replies made by plaintiff were practically of the same legal effect, alleging as defenses to defendants' answers:

(1) That the said H. J. Ewing, the judgment creditor, in the said case of *Ewing v. Tanner et al.*, accepted a note in satisfaction of said judgment in the justice's court prior to the sheriff's levy and sale under execution.

(2) That the judgment and execution under which the execution sale was made did not run against the separate property of the defendants in the case of *Ewing v. Tanner et al.*, as copartners, but against their partnership property only, and that therefore the said sheriff's levy against and sale of the separate property of the defendant Tanner was void.

(3) That the said levy was made for the full amount of



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said judgment in the justice's court, when in fact a portion of said judgment had been paid, as the defendants herein knew, or might have known by the exercise of ordinary care.

(4) That the levy and sale were excessive and irregular for the reason that the real property sold consisted of several distinct parcels of land of much greater value than the amount of the judgment under which it was sold, and that the said lands were all sold as one parcel.

(5) That the plaintiff was, with defendants' knowledge, at all times mentioned in their answers, in the absolute, open, quiet, peaceable, notorious and adverse possession of the lands sold.

The case was tried to the court without a jury, and the issues were found in defendants' favor. Plaintiff appeals.

In brief, the plaintiff complains of and assigns as error the failure of the trial court to find on all the material issues in the case; that the evidence does not justify and is insufficient to support the trial court's finding of fact, conclusions of law, and decree; and that the same are contrary to law.

The testimony, briefly stated, shows: May 24, 1911, Henry S. Tanner became the owner of the land in controversy. February 18, 1914, a judgment for \$154, interests and costs, was rendered in the justice's court for Salt Lake county against Henry S. Tanner, D. W. Adamson, and W. P. Funk, copartners, doing business under the name of Farmers' Loan & Trust Company in favor of H. J. Ewing, one of the defaulting defendants herein. February 19, 1914, the day following the rendition of the judgment, Henry S. Tanner, by deed, conveyed the land to the National Realty Sales Company, a corporation, the plaintiff in the present case. This deed was not recorded in the office of the county recorder for Utah county until June 28, 1917, at 4:05 o'clock p. m. January 5, 1915, an abstract of the judgment rendered against Henry S. Tanner and others in the justice's court of Salt Lake county was issued out of said court, and said abstract was docketed in the district court of Utah county March 2, 1916, as "Case No. 3482, Civil." Execution issued out of said district court, directed to the sheriff of Utah county, in said civil case

No. 3482, on June 5, 1916, and on July 3, 1916, after proceeding in accordance with law, said sheriff sold to H. J. Ewing all the estate, right, title, and interest of Henry S. Tanner in said lands, and a certificate of sale was issued to Ewing by said sheriff. After the period of redemption had expired, to wit, on January 20, 1917, said sheriff made and executed a sheriff's deed to H. J. Ewing for the said lands which deed was duly recorded in the office of the county recorder for Utah county on said day.

It further appears from the record that the said H. J. Ewing, June 14, 1917, redeemed said premises from delinquent tax sales made for the taxes levied thereon for the years 1910 to and including the year 1914.

June 15, 1917, H. J. Ewing, for a consideration of \$1,600, conveyed said lands by warranty deed to William J. Finlayson, which said deed was duly recorded in the office of the county recorder for Utah county June 28, 1917, at 11:20 o'clock a. m. Said William J. Finlayson, by mortgage dated June 19, 1917, acknowledged June 22, 1917, mortgaged said premises to secure a loan of \$2,000 to the defendant Farmers' & Stockgrowers' Bank, which said mortgage was recorded in the office of the county recorder for Utah county, June 28, 1917, at 11:30 o'clock a. m. William J. Finlayson died intestate July 21, 1917.

The preceding facts appear as matters of public record and are not in dispute between the parties. As we proceed we shall have occasion to briefly refer to other features of the testimony having a bearing on the contentions of the respective parties.

The trial court found, among other things not necessary to here mention:

That the sheriff of Utah county sold the lands in accordance with law to the defendant H. J. Ewing; "that the said sheriff, in accordance with the sale to the said H. J. Ewing, executed and delivered a certificate of sale to said premises; that after the time for redemption had expired and neither the said H. S. Tanner nor any other person claiming under him, or otherwise, having redeemed the aforesaid lands and premises from said sale, the said sheriff on or about the 20th day of January, 1917, executed and delivered to said H. J. Ewing a sheriff's deed to the aforesaid lands and

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premises; that at the time of said sheriff's sale, as aforesaid, the said H. S. Tanner had been and was the real owner of the aforesaid lands and premises."

The trial court then proceeds to make further findings to the effect that H. J. Ewing and his wife subsequently sold the premises to William J. Finlayson for a consideration of \$1,600, and that he thereafter mortgaged the property to the defendant the Farmers' & Stockgrowers' Bank, to secure a promissory note dated June 19, 1917, for \$2,000 (no part of which has been paid), and that the aforesaid transactions were "without notice of any claim by the plaintiff of any right, title, or interest in or to said property."

It is the contention of the plaintiff that, at the time of the sale of the property under execution, the judgment debtor had no interest therein, having previously conveyed the premises to the plaintiff by deed dated February 19, 1914, although the same was not recorded in the office of the county recorder of Utah county until June 28, 1917, after the sale under execution, the issuance of a sheriff's deed to Ewing, his sale and conveyance to William J. Finlayson, defendant's intestate, and the latter's mortgage to the defendant the Farmers' & Stockgrowers' Bank had been made matters of public record. If we correctly understand plaintiff's counsel, they do not seriously contend that the plaintiff had any right under the circumstances to assume that it could stand idly by relying on its unrecorded deed and permit innocent parties to deal with respect to the property without knowledge or any notice whatever of the plaintiff's claims in the property, but that plaintiff's possession of the premises was sufficient to put the defendants on notice. The law is well settled and firmly established, and it may be said to be the general doctrine both in this country and in England, that a subsequent purchaser cannot be protected as a bona fide purchaser if he had actual or constructive notice of an unrecorded title, 1 ownership, or interest in the property at any time before payment of the purchase price. *Wade on Notice*, section 273; *Beattie v. Crewdson*, 124 Cal. 577, 57 Pac. 463; *Shafer v. Killpack*, 53 Utah, 468, 173 Pac. 948. In the present case the plaintiff relies on its possession as giving notice of title and

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ownership of the premises involved. The testimony shows that the lands in question are fenced, but have no other improvements thereon. Henry S. Tanner testified that the lands were leased by him to a Mrs. Hansen, who farmed a small portion thereof from year to year during his ownership, and that after he deeded the property to the plaintiff Mrs. Hansen continued to make use of the land for pasturage and some farming, as did also a Mrs. Tanner. There is testimony in the record that the land was platted and cut up into city lots which were advertised and offered for sale through the medium of circular letters and newspaper advertisements. The plats of the land were not, however, made matters of public record, nor is it shown that any of the advertising matter came under the notice of any of the defendants. The testimony of the defendants is to the effect that they had no knowledge whatever of any of these things. The defendants' testimony further tends to show that Henry S. Tanner was informed concerning the judgment rendered against him and that he was given to understand that an effort would be made to collect the judgment. Arman W. Ewing, a brother and agent of the defendant H. J. Ewing, who transacted and directed the business relative to the sale of the lands under execution, and also afterwards with respect to a sale to William Finlayson, testified:

"I informed Mr. Tanner that the sheriff was advertising the property in accordance with law, and I told him that we didn't want to go further with it; that we preferred to have him pay the judgment and costs, which he promised to do. \* \* \* That was during the time the advertising was going on in the Provo paper."

The same witness testified, in substance, that after the premises were sold under execution sale, and his brother had become the purchaser and had received the sheriff's deed therefor, he and his brother went upon the land with a deputy county surveyor, established the boundaries, and marked the corners of the lands; that at that time there was no one in possession of or using the lands; that they then made arrangements with a nearby farmer to take and use the land under the ownership of H. J. Ewing. Lottie Finlayson, defendant in a representative capacity of the estate of William

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Finlayson, deceased, testified that, soon after her husband acquired the property by purchase from H. J. Ewing, her husband died; that she knew the land and had visited it from time to time after the purchase thereof; that it was not occupied by any person, but was left barren and unattended. She further testified that she had no knowledge whatever of the plaintiff claiming an interest in the land until a summons was served upon her in this action. James F. Hiatt, a witness for the defendants, testified that he had some intention of leasing or purchasing the lands under consideration during April, 1917, after the defendant H. J. Ewing had received a sheriff's deed therefor; that he met Mr. Tanner in Salt Lake City, and—

"I told him that Mr. Ewing was offering to sell the land. \* \* \* I told Mr. Tanner that I had called at the recorder's office and found that there was a recorded deed in the name of H. J. Ewing and it was A. W. Ewing that I had been dealing with. This was the first that I heard of H. J. Ewing and that there was a man by the name of Adamson and Funk and Tanner, as I remember it, associated together. This ground was sold to H. J. Ewing at an auction sale in Provo on a certain date, and I described the land, or the proceedings along this line. Mr. Tanner expressed somewhat of surprise that the title had got in that condition, and he told me he would have to look into it. He says, 'they can't sell my land that way, you know.'"

We have reviewed the authorities cited in plaintiff's brief with care, and we fail to find a single case bearing upon the question of possession in which it has been held that possession of the kind and character testified to by plaintiff's witnesses is sufficient, under similar circumstances, to charge third parties or purchasers with notice of ownership or sufficient to put the intending purchaser upon inquiry. To say the least, the testimony of the plaintiff's witnesses was exceedingly vague and doubtful with respect to the question of possession, and the testimony of defendants' witnesses is in conflict therewith. It is held by the courts, in general, and the authorities cited by plaintiff afford no exception to the rule, that possession of real property, in order to impart notice of the occupant's title and equities, must be open, notorious, visible, and continuous. Warvelle on Ab-

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stracts, sections 361, 581; Wade on Notice, section 238. 2, 3 Moreover, as we have pointed out, Mr. Tanner, as president of the plaintiff company, stood by with full knowledge of the fact that the lands were about to be sold under execution; that the property afterwards had been sold; and that a sheriff's deed had been issued to the purchaser and recorded. More than that, he was apprised that the purchaser was intending to sell the property to third parties. In the meantime he stood placidly by, inactive and without protest, and permitted the defendants, the subsequent purchaser and incumbrancer, to act upon the title made manifest in H. J. Ewing by the proceedings made of record against the property.

It does seem that the property now under consideration was sold under the execution for an inadequate price. However, mere inadequacy of price was not sufficient to invalidate the sale when the proceedings were fair and regular and there is nothing in the record to suggest fraud or concealment. 16 R. C. L. 140; *Wilkins v. Rue*, 4 Blackf. (Ind.) 263, 29 Am. Dec. 368; *Bogle v. Bloom*, 36 Kan. 512, 13 Pac. 793. The plaintiff was apprised of all the proceedings against its property, and had it acted seasonably it could have averted the acts of which it complains without prejudicing the rights of the defendants now, as we think, fully established by the conduct of the respective parties under the circumstances as disclosed by the record before us.

"If there has been unreasonable delay in asserting claims, or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, or suffers his adversary to incur expense or enter into obligations or otherwise change his position, or in any way by inaction lulls suspicion of his demands to the harm of the other, or if there has been actual or passive acquiescence in \* \* \* the act complained of, equity will ordinarily refuse \* \* \* aid \* \* \* of an admitted right." *Stewart v. Finkelstone*, 206 Mass. 28, 92 N. E. 37, 28 L. R. A. (N. S.) 634, 138 Am. St. Rep. 370.

Under our statute, Comp. Laws Utah 1917, section 6934, with respect to execution sales, Henry S. Tanner or the plaintiff, could have directed the sale of the property to

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have been made in parcels, if so desired. The land 4, 5 was, as the testimony shows, but one parcel within the meaning of the law. Moreover, the plaintiff could have then asserted its claim of ownership, which it did not do.

The defendants in this action acquired their interests in the property without notice of any rights of the plaintiff in the property as the trial court found, and their rights, in view of the laches of the plaintiff, must be upheld.

We find no prejudicial error in the record before us, and therefore it is ordered that the judgment and decree of the district court be affirmed, with costs.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

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SALT LAKE CITY v. WESTERN FOUNDRY & STOVE  
REPAIR WORKS.

No. 3398. Decided Jan. 13, 1920. On Application for Rehearing, February 17, 1920. (187 Pac. 829.)

1. MUNICIPAL CORPORATIONS—CITY HAD AUTHORITY TO CREATE RESIDENCE DISTRICT. Under Comp. Laws 1917, sections 570x69, 570x70, 570x87, a city had the right to exclude foundries from a particular section of the city, in good faith created a residence district, although there were other sections in the city, where the conditions were similar in character, which were unaffected by the ordinance establishing the district.<sup>1</sup> (Page 452.)
2. MUNICIPAL CORPORATIONS—CREATING RESIDENCE DISTRICT AND PROHIBITING OPERATION OF FOUNDRY NO VIOLATION OF ORGANIC LAW. An ordinance of a city, creating a residence district under Comp. Laws 1917, sections 570x69, 570x70, 570x87, and prohibiting the operation of foundries, etc., therein, does not violate any rights guaranteed by the organic law of the state. (Page 453.)
3. EMINENT DOMAIN—EXCLUSION OF INDUSTRIAL PLANTS FROM RESIDENCE DISTRICT, NOT TAKING OF PROPERTY WITHOUT COMPENSATION. Where the creation of a residence district would ex-

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<sup>1</sup> *Salt Lake City v. Utah L. & Ry. Co.*, 45 Utah, 50-62, 142 Pac. 1067.

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Salt Lake City v. Western Foundry etc., Works, 55 Utah 447.

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tend to the needs of the general public the power to regulate or prohibit by ordinance the invasion of such a district by industrial plants ought not to be questioned on the ground that the exclusion of an industrial plant would be the taking of property for public use without just compensation. (Page 454.)

Appeal from District Court, Third District, Salt Lake County; *P. C. Evans*, Judge.

The Western Foundry & Stove Repair Works was convicted of having violated a city ordinance of Salt Lake City, creating a residence district, and it appeals.

**AFFIRMED.**

*M. L. Ritchie* and *Walton & Walton*, all of Salt Lake City, for appellant.

*W. H. Folland*, City Atty., and *H. H. Smith* and *Shirley P. Jones*, Asst. City Attys., all of Salt Lake City, for respondent.

CORFMAN, C. J.

The defendant was convicted, in the district court of Salt Lake county, upon an appeal from the city court of Salt Lake City, of having violated a city ordinance creating a residence district, and making it unlawful, among other things, to erect or maintain a foundry within the district created. The board of commissioners of Salt Lake City passed the ordinance, under which defendant was tried and convicted, July 23, 1917, amending an ordinance passed by the board June 12, 1917. The ordinance, as originally passed, and before amendment, made it unlawful to erect or maintain within the boundaries of the district described any foundry, etc., and set aside the restricted area as a residence district, but excluded under its provisions industrial plants in actual operation at the date of its passage. As amended, all specified industrial plants, whether in operation or not, were included, but the boundaries of the district were so changed as to exclude from the re-



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stricted area a certain brass foundry, theretofore included under the provisions of the ordinance passed June 12, 1917. The testimony shows that the defendant's plant was the only foundry within the restricted area as defined by the amended ordinance under which it was prosecuted. For some years prior to 1917 the defendant had operated a foundry at the rear of No. 531 South State Street, Salt Lake City, a short distance south of the city and county building. In midwinter, 1916-1917, the defendant selected and purchased a building site at the northeast corner of the intersection of Eighth West and Ninth South streets, now within the boundaries of the residence district afterwards created by the ordinance. About April 1, 1917, the defendant applied for and was granted a permit by the building inspector of Salt Lake City to erect a brick building on said building site "to be used for business." Thereafter, in early April, 1917, the defendant commenced the work of erecting a foundry building on said site, and thereupon many residents and property owners in the immediate neighborhood began to protest to the board of city commissioners against the erection of the foundry. About the same time the defendant petitioned the board of city commissioners for permission to construct and maintain a spur railway track to run to its plant then in course of construction, and stating for the first time that "petitioner is now building and constructing an iron foundry on the land owned by it." Numerous conferences thereafter followed between the city commission and the petitioner's officials, which finally culminated in an offer being made by Salt Lake City to purchase the defendant's building site, which offer, however, was subsequently withdrawn and the ordinance passed creating the aforesaid residence district. The defendant proceeded, however, with the completion of its foundry plant, and then to operate the same, by reason of which it was complained of, prosecuted, and found guilty before a jury of having violated the ordinance.

The testimony is quite conclusive that the character of the restricted area is essentially a residence district, not always thickly populated and built up with homes, but containing

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many private dwellings, interspersed with vacant lots, churches, schools, and having a public library in the immediate vicinity of defendant's plant. The record also shows that the passage of the ordinance in question was the initial attempt on the part of the board of commissioners to zone the city by creating a residence district. Outside of the restricted area thus defined are many residential sections built up with homes, among which are interspersed various industrial plants in operation of the kind and character of those specified as being prohibited in the limited section or residence district by the provisions of the ordinance now under consideration.

The defendant, on appeal, questions the constitutionality of the ordinance and its validity on the grounds that it is unreasonable and discriminatory.

By legislative enactment, Comp. Laws Utah 1917, section 570x69, the board of city commissioners was given the power "to direct the location and regulate the management and construction of \* \* \* foundries \* \* \* in and within one mile of the limits of the corporation." Under the provisions of section 570x70, the power is given "to prohibit any offensive, unwholesome business or establishment in and within one mile of the limits of the corporation," and the further power "to regulate the location thereof." Under a general welfare clause, section 570x87, the board of commissioners is empowered "to pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and such as are necessary and proper to provide for the safety, and preserve the health, and promote the prosperity, improve the morals, peace, and good order, comfort, and convenience of the city and the inhabitants thereof, and for the protection of property therein."

If we correctly understand the contention made by defendant's counsel, it is that, while under the foregoing general welfare clause the city would have the right to exclude from its corporate limits foundries and other objectionable business entirely, yet it would not have the right nor be justified in excluding them from a particular section of the city and

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allow them to be maintained and operated in other sections where the conditions are similar in character. In support of their contention counsel have cited and quoted extensively in their brief from the following authorities: *Salt Lake City v. Utah L. & Ry. Co.*, 45 Utah, 50-62, 142 Pac. 1067; *Ex parte Bohen*, 115 Cal. 372, 47 Pac. 55, 30 L. R. A. 618; *Los Angeles v. Hollywood Cemetery*, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75; *Ex parte Dondero*, 19 Cal. App. 66, 124 Pac. 884; *Weadock v. Judge*, 156 Mich. 376, 120 N. W. 991, 132 Am. St. Rep. 527, 16 Ann. Cas. 720; *State v. Sheriff*, 48 Minn. 236, 51 N. W. 112, 31 Am. St. Rep. 650. As we read the foregoing authorities, they shed no light on the precise question involved in the present case. The opinions quoted by counsel refer to and discuss ordinances held to be unreasonable and invalid because their provisions did not apply to all citizens alike within the district created. They assumed to restrict the rights of one class, while at the same time permitting another class similarly situated to exercise and enjoy the rights and privileges denied in the first instance. By way of illustration, in the case of *Ex parte Bohen*, supra, the ordinance under consideration by the California court prohibited burials of the dead within a certain district of the city of San Francisco, but at the same time excepted from its restrictive provisions those who had acquired burial lots at the time of the passage of the ordinance. The California court therefore held the ordinance invalid because it was discriminatory in its operation between individuals similarly situated. All the cases cited and discussed by defendant are of like character and would be clearly in point had the defendant been prosecuted and convicted under the ordinance as originally passed by the board of commissioners June 13, 1917. The ordinance then excepted "such individual plants as are on the date of the passage of this ordinance in actual operation" from the operation of its provisions. As amended and passed July 26, 1917, the foregoing discriminatory feature is eliminated. No exceptions are made, and its provisions apply to and operate uniformly upon all citizens alike within the residential district created.

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But it is contended by defendant that the amended ordinance under which it was prosecuted is none the less discriminatory because the board of commissioners acted arbitrarily in creating a limited district, thus discriminating between localities similarly situated and persons desiring to do business in them. While it is true, the record shows that considerable portions of the city outside of the district created are used mainly for residential purposes, yet it does not necessarily follow that in effect the ordinance we have under consideration designates these residential sections outside the district it expressly creates as industrial or otherwise. In passing the ordinance the board of commissioners did no more than undertake, after full investigation of conditions in the particular residential district created, to provide for the peace, good order, comfort, and convenience of the inhabitants of the city and to protect the citizens' property therein. One step in the right direction on the part of the city government ought not to be held as conclusive that in the course of time it will not take another. So long as the Legislature in its wisdom sees fit to confer upon city commissions the specific police power of regulating tanneries, bone factories, slaughterhouses, soap factories, foundries, etc., by excluding them from a particular section designed for or largely built up with homes, schools, and churches where their erection, operation, and maintenance will at once become intolerable, courts will not be prepared to say they have acted unreasonably nor for merely esthetic purposes. *City of Chicago v. Stratton*, 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. Rep. 325; *People v. Ericsson*, 263 Ill. 368, 105 N. E. 315, L. R. A. 1915D, 607, Ann. Cas. 1915C, 183; *People v. Village of Oak Park*, 266 Ill. 365, 107 N. E. 636; *Ex parte Quong Wo*, 161 Cal. 220, 118 Pac. 714; *Walcher v. First Presbyterian Church* (Okla.) 184 Pac. 106; *Reinman v. Little Rock*, 237 U. S. 171, 35 Sup. Ct. 511, 59 L. Ed. 900; *Hadacheck v. Sebastian*, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927.

We think it is apparent from the testimony in the record before us that the board of commissioners acted in absolutely good faith in passing the ordinance we have 1

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under consideration. Numerous property owners and residents within the district created had timely petitioned that the erection and operation of the defendant's foundry be not permitted. The board of commissioners did not assume to act before making full investigation. Out of consideration for the defendant they at first went so far as to make an offer to purchase the defendant's site and the improvements placed thereon at practically the cost price to it. The offer was not accepted. The board of commissioners then proceeded to pass the ordinance, and the defendant proceeded to complete and operate its foundry. Under all the circumstances as detailed by the record we would not feel justified otherwise than by imputing good faith on the part of the city and holding that the board of city commissioners did not act arbitrarily nor with any intention of discriminating against the defendant.

Nor do we think the enforcement of the ordinance as against the business of the defendant was violative of any of its rights guaranteed by the organic law of the 2 state. Practically the same questions as here presented were involved in the case of *Hadacheck v. Sebastian*, supra. In that case the city of Los Angeles passed an ordinance making it unlawful for any one to establish, conduct, operate, or manage a brickyard within a described portion of the city. The defendant was tried and convicted under the ordinance. Habeas corpus was prosecuted before the Supreme Court of California for the discharge of the defendant. The California court upheld the constitutionality of the ordinance. The case was then taken to the Supreme Court of the United States, and there its constitutionality again attacked, but upheld as before in the state court. The opinion of the United States Supreme Court, written by Mr. Justice McKENNA, in speaking approvingly of the decision made by the California Supreme Court, says:

"The court, on the evidence, rejected the contention that the ordinance was not in good faith enacted as a police measure, and that it was intended to discriminate against petitioner, or that it was actuated by any motive of injuring him as an individual. The charge of discrimination between localities was not sustained. The court expressed the view that the determination of prohibition was

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for the Legislature, and that the court, without regard to the fact shown in the return that there was another district in which brick making was prohibited, could not sustain the claim that the ordinance was not enacted in good faith, but was designed to discriminate against petitioner and the other brickyard within the district. 'The facts before us,' the court finally said, 'would certainly not justify the conclusion that the ordinance here in question was designed, in either its adoption or its enforcement, to be anything but what it purported to be, viz. a legitimate regulation, operating alike upon all who come within its terms.' We think the conclusion of the court is justified by the evidence and makes it unnecessary to review the many cases cited by petitioner in which it is decided that the police power of a state cannot be arbitrarily exercised. The principle is familiar, but in any given case it must plainly appear to apply. It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. *Chicago & Alton R. R. v. Trandarger*, 238 U. S. 67, 78 (35 Sup. Ct. 678, 59 L. Ed. 1204)."

Again, the opinion says:

"It may be that brickyards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be. That petitioner's business was first in time to be prohibited does not make its prohibition unlawful. And it may be, as said by the Supreme Court of the state, that the conditions justify a distinction. However, the inquiries thus suggested are outside of our province."

The United States Supreme Court also held that the Los Angeles ordinance was not violative of section 1 of the Fourteenth Amendment to the federal Constitution.

There can be no doubt but that the enforcement of the ordinance will work a hardship upon the defendant, and as to it it will occasion some financial loss. However, it must be kept in mind that the district in which the foundry is situated is residential in its character. That being true, the establishment of industrial plants within it would very likely deprive the many owners of the use and enjoyment of their property for the purposes for which it was acquired, or, at least, might greatly depreciate property values by rendering it undesirable as places for residence. Under the

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circumstances it would seem the police power would extend to the needs of the general public, and the power to regulate or prohibit by ordinance an invasion of the district by industrial enterprises ought not to be questioned on the ground that the exclusion of an industrial plant would be the taking of property for public use without just compensation. *In re Matter of Application of Russell*, 158 N. Y. Supp. 162; *Town of Colton v. So. Dakota Central Land Co.*, 25 S. D. 309, 126 N. W. 507, 28 L. R. A. (N. S.) 122; *In re Montgomery*, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; *Re Anderson*, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421; *Ex parte Lacy*, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93.

As we view the ordinance under consideration, it operates uniformly upon all classes of persons similarly situated within the residential district created by it. The district defined was not arbitrarily created, nor was the ordinance passed with any intent or design to injure the defendant or to discriminate against it or any other person within the district who might be affected by its provisions. Under the circumstances hereinbefore pointed out, we, as a court, could not substitute our judgment, even if we were so inclined, for that of the board of city commissioners, and thus exercise legislative functions clearly theirs, not ours, by saying the district in question ought not to have been created.

For the reasons assigned, it is ordered that the judgment entered on conviction of the defendant in the district court be affirmed. Respondent to recover costs of printing briefs.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

ON APPLICATION FOR REHEARING.

CORFMAN, C. J.

Defendant has made application for a rehearing. Counsel apparently feel much aggrieved. They assume that the individual members of the court have not given the case the

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thought and consideration its importance demands. They openly assert that they "did assume that the court, or at least the writer of the opinion, would read the record in detail, and not take things against us merely because they might be asserted in our opponent's brief." (Italics ours.) This court may commit error; its written opinions may at times have the appearance of adhering too closely to the arguments and reasoning of counsel for one litigant as opposed to another, but, be that as it may, the court as a whole and the individual members thereof, including the writer of the opinion so severely criticized, at all times make a conscientious endeavor to be fair to the parties litigant and decide questions in accordance with the record submitted, and apply the law the court believes to be applicable thereto.

We have endeavored to discharge our duties in these particulars in the present instance. We may have been inapt in our statement of the facts; our conclusions of law may seem ill-founded, and the language employed in assigning our reasons for arriving at them may not appear to counsel altogether logical, but nevertheless, we insist we endeavored to properly discharge our duty, and it seems to us that we acted advisedly. We are, however, charged with taking things against defendant because they are asserted in the brief of opposing counsel. Counsel for defendant also complain of our finding that the city was not advised of the real character of the building until after the work was commenced. We still think that finding was a correct one. In order that we may relieve the court from any appearance of relying on respondent's brief, we call particular attention to complaining counsel's abstract of the record, the testimony of their own witness, H. Finkelstein, manager of respondent company, which, without qualification, reads:

"I think they started to excavate for the foundry around April 1st. I dictated the letter dated April 2, 1917, petition No. 177, for the spur; that is my signature as president. I do not know when the building permit was obtained; the contractors were to apply for it. We never petitioned the board of commissioners for permission to erect the foundry at this place, nor advised them that we were going to do so. I suppose the first intimation that they had



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*of it was when we submitted our petition for a spur. After that we had some negotiations with the city, and quite a bit later they denied the petition."* (Italics ours.)

To show that complaining counsel are absolutely correct in their abstract of the record, and also that they may be convinced that we have read the transcript and are not affirming the findings made in the opinion nor "taking things against them merely because asserted in the brief of opposing counsel," we quote from the transcript (pages 52, 53) testimony of the same witness:

"Q. You never petitioned the board of commissioners for permission to erect the foundry? A. No, sir. Q. At this place? A. No, sir. Q. You merely— A. Turned the contract over to the contractors. Q. The contractors— A. They were supposed to— Q. Entered into an agreement with the contractors? A. Yes, sir. Q. To erect you a building at this place? A. Yes sir. Q. For a foundry? A. Yes, sir. Q. And up to that time you had not consulted with any of the city officials? A. No, sir. Q. The building inspector or any one? A. No, sir."

Again, it is asserted that our opinion seems to hold that the matter of good faith of the commissioners is made the test as to whether the ordinance is arbitrary or discriminatory. We did take occasion to say that from the testimony in the record the commissioners acted in absolute good faith. Whether or not the statement was pertinent to the issues involved, and particularly in view of the contention made by defendant's counsel that the ordinance was "unreasonable and discriminatory," the opinion as written speaks for itself. Aside from those matters, however, this court, when so disposed, will, nevertheless, feel privileged to comment on the conduct of public officers, when assailed rightfully or wrongfully by counsel appearing before it, in such a manner as we feel the record before us justifies. On page 3 of counsel's brief they use this language with respect to changes made in the ordinance:

"The ordinance was so raw on its face that the commission deemed it necessary, in order to get the defendant, to amend the same. \* \* \* These changes, while evidently suggesting unworthy motives, which may not be material, did not make the ordinance less unreasonable and discriminatory as a matter of fact, and changed no physical situation or status."

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We assure counsel that the record on this appeal, together with their petition and brief and argument on petition for rehearing, have been most thoroughly and conscientiously considered by all members of the court.

We think the opinion as written should stand, without apology, as the deliberate judgment of the court, and therefore the petition for a rehearing is denied.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

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WOODCOCK v. BOARD OF EDUCATION OF SALT  
LAKE CITY et al.

No. 3409. Decided January 13, 1920. (187 Pac. 181.)

1. **MANDAMUS—INJURED EMPLOYÉ MAY PERSONALLY MAINTAIN MANDAMUS TO COMPEL PAYMENT OF COMPENSATION UNDER WORKMEN'S COMPENSATION ACT.** A school teacher who was awarded compensation for personal injuries by the Industrial Commission may sue in mandamus in her own name to compel the school board to pay the compensation awarded; Comp. Laws 1917, section 3130, providing that such an action could be brought in the name of the state, providing only a cumulative remedy. (Page 463.)
2. **MANDAMUS—PARTY BENEFICIALLY INTERESTED MAY MAINTAIN.** Mandamus is a special proceeding which the party beneficially interested may always institute and maintain in his own name and behalf. (Page 463.)
3. **SCHOOLS AND SCHOOL DISTRICTS—NOT LIABLE FOR PERSONAL INJURIES.** Actions for damages for personal injuries will not lie against school districts; such districts being corporations with limited powers which act merely on behalf of the state in discharging the duty of educating the children of school age in the public schools created by the general laws. (Page 463.)
4. **MASTER AND SERVANT—FAILURE OF COMPENSATION ACT TO PROVIDE HOW FUNDS SHALL BE RAISED DOES NOT RELIEVE SCHOOL DISTRICTS FROM PAYING COMPENSATION FOR INJURY TO TEACHER.** While the Workmen's Compensation Act merely requires school districts to pay compensation, and does not provide how the fund to pay the compensation shall be raised, yet that, standing alone, would not necessarily relieve a school district from the power or duty of paying compensation awarded, nor would

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the fact that the school funds partake of the nature of trust funds. (Page 465.)

5. **MASTER AND SERVANT—COMPENSATION UNDER WORKMEN'S COMPENSATION ACT NOT DAMAGES BUT SALARY.** Compensation awarded under the Workmen's Compensation Act is not damages for injuries sustained, but is compensation pure and simple, being merely another term for salary or wages. (Page 469.)
6. **CONSTITUTIONAL LAW—COURTS MAY NOT STRIKE DOWN LAWS BECAUSE LACKING IN DETAIL.** The courts may not strike down laws or refuse their enforcement because they may be imperfect or lacking in some detail; it being the duty of the court to enforce the law as it finds it, regardless of what the results in a particular case may be. (Page 469.)
7. **MASTER AND SERVANT—COMPENSATION FOR INJURIES TO TEACHER UNDER WORKMEN'S COMPENSATION ACT PAYABLE OUT OF "SUPPORT AND MAINTENANCE" FUND.** Under Workmen's Compensation Act a school board is liable to an injured teacher for an amount awarded to her as compensation by the Industrial Commission, and such amount is payable out of the funds that are raised by taxation for the support and maintenance of the schools; the term "support and maintenance" under Comp. Laws 1917, section 4704, being ample in scope and meaning to cover compensation provided for in the act, where the school district has not contributed to the state insurance fund. (Page 469.)
8. **STATUTES—INTENT MUST BE GIVEN EFFECT.** Unless there is some constitutional or other fundamental objection, it is the duty of the courts to place such a construction upon the different provisions of the statutes as will make the legislative intention effective, unless prevented from doing so by the ordinary rules and canons of interpretation and construction. (Page 469.)
9. **SCHOOLS AND SCHOOL DISTRICTS—AWARD OF COMPENSATION NEED NOT BE VERIFIED OR AUDITED.** Compensation awarded a school teacher under the Workmen's Compensation Act is a liquidated claim partaking of the nature of a judgment against the school district, and the board has no discretion respecting its allowance or payment, and hence it need not be verified or audited. (Page 472.)
10. **MANDAMUS—RIGHT TO HAVE ACT PERFORMED MUST BE CLEAR.** Where public officers are sought to be coerced by a writ of mandate to do certain acts, the right of the plaintiff to have the acts performed must be clear, and the corresponding duty upon the officer to do the required act must be correspondingly clear. (Page 472.)
11. **MANDAMUS—WILL NOT LIE TO COMPEL OFFICER TO MAKE PAY-**

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MENT IN ABSENCE OF FUNDS. While a public officer or board may by mandamus be coerced to pay a particular claim, in order to obtain a peremptory writ for payment, it must be alleged and, if denied, proved that such officer or board has funds with which to pay that particular claim.<sup>1</sup> (Page 472.)

12. MANDAMUS—SCHOOL BOARD MAY BE REQUIRED TO PAY COMPENSATION TO INJURED TEACHER IN ABSENCE OF SPECIAL APPROPRIATION. Mandamus will lie against a school board to compel payment of compensation awarded under the Workmen's Compensation Act if the board has sufficient money in the support and maintenance school fund to pay the claim, although the board has not made a special appropriation for the payment of compensation. (Page 473.)

Proceeding in mandamus by Rae E. Woodcock against the Board of Education of Salt Lake City and others to compel payment of compensation awarded under the Workmen's Compensation Act.

WRIT DENIED.

*Dan B. Shields*, Atty. Gen., and *O. C. Dalby*, *Jas. H. Wolfe*, and *Herbert Van Dam, Jr.*, Asst. Attys. Gen., for plaintiff.\*

*Cheney, Jensen & Holman*, of Salt Lake City, for defendants.

FRICK, J.

The plaintiff filed an application in this court in which she prayed for an alternative writ of mandate against the defendants as officers and members constituting the board of education of Salt Lake City, and also against said board as such. In her application, after stating the necessary jurisdictional facts and the usual matters of inducement, she in substance alleges that on a certain day named she was in the employ of said board of education, hereinafter styled board merely, as a teacher in the public schools of Salt Lake City; that on a certain day she, in the course of her employment, sustained

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<sup>1</sup> *Hamblin v. State Board*, 187 Pac. 178.

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certain personal injuries; that she had duly made an application to the Industrial Commission of this state, hereinafter called commission, to be awarded compensation for the injury sustained as aforesaid; that upon due notice to said board a hearing was duly had upon her said application before said commission, which, on the 25th day of July, 1919, rendered its decision against said board awarding the plaintiff the sum of "seventy-two dollars compensation, together with one hundred and twenty-eight dollars hospital expenses, fifty dollars for medical charges and eight dollars for medicines and supplies, \* \* \* making in all the sum of two hundred and fifty-eight dollars"; that the time for an appeal from said decision and award has elapsed and no appeal has been taken by said board; that a demand for the payment of said sum of two hundred and fifty-eight dollars has been duly made on said board, which has refused and still refuses to pay the same. The facts respecting the making of said demand and the refusal of the board to comply therewith are fully stated in the application. It is further alleged that the plaintiff has no remedy by which payment of said award may be enforced except the writ of mandate, and therefore she prays that a writ issue against said board.

An alternative writ was duly issued, to which the board has filed both a special and a general demurrer, and at the same time also filed an answer. We remark that there were two separate demurrers filed; one on behalf of the individual officers and members composing the board of education, and one on behalf of the board as such. In this opinion we shall consider only the demurrers and answers filed on behalf of the board. We do so for the reason that nothing could either be gained or lost by referring specially to the demurrers and answers filed on behalf of the officers and individuals composing the board.

In the answer of the board the facts alleged in the application are practically all admitted. The answer, however, sets forth with much particularity and detail the duties and powers of the board, and states what, in the judgment of the board, constitutes good and sufficient legal reasons why the

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amount awarded to plaintiff has not been paid and why the board refuses to pay the same. In view of the conclusions reached by us, the particulars of the foregoing answer are of no special significance and hence we omit further reference thereto. The board in its answer, however, also avers "that the board of education of Salt Lake City has no moneys nor funds out of which plaintiff's claim may be paid." That averment is supplemented by others to the effect that the board did not have timely notice of plaintiff's claim to make provision for its payment, etc. We remark that the plaintiff omitted to state in her application that the board had money or funds on hand with which to pay the amount awarded to her by the commission. The Attorney General, who represents plaintiff in this court, took the position at the hearing that such an averment was not necessary. In view that it is more convenient for us, we shall defer consideration of that phase of the case until later on in the opinion, and will now refer to the special demurrer filed on behalf of the board.

The grounds of special demurrer are to the effect that the plaintiff lacks legal capacity to sue and that there is a defect of parties, in that the state of Utah is not named as a party plaintiff, etc. The arguments respecting those grounds blend and overlap, and hence both may be considered together.

Counsel for the board insist that in view that in the original act (Comp. Laws Utah 1917, section 3130), creating the commission and providing for the payment of compensation to injured employes, it is provided that, in the event any employer shall fail to pay the compensation awarded to an injured employe within the time specified in section 3130, the compensation awarded "may be recovered in an action in the name of the state for the benefit of the person \* \* \* entitled to the same," therefore the plaintiff should at least have joined the state with her as a party plaintiff. After considering all the provisions of the act in connection with other statutory provisions, we are of the opinion that it was not the intent or purpose of the Legislature to prevent the injured employe from prosecuting an action or proceeding in his own name if he felt so disposed. The language quoted from the

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section is directory rather than mandatory. There is nothing in the act which indicates that the action referred to in section 3130 was intended to be exclusive. From the language employed we are constrained to hold that the action or remedy in that section referred to, was intended to be cumulative and not exclusive. This view is strengthened by the fact that under our statute, unless there is some express provision to the contrary, it is not only proper for the real party in interest, if he be competent and sui juris, to bring all actions in his own name, but the statute requires him to do so. Then again, under our statute mandamus is a special proceeding which the party beneficially interested may 1, 2 always institute and maintain in his own name and behalf. We are of the opinion, therefore, that while under section 3130, *supra*, the commission could have commenced the action in the name of the state for the benefit of plaintiff, she nevertheless had the right to bring the action or proceeding and to prosecute the same to full determination in her own name. While the action provided for in section 3130 was intended for the benefit of the injured employé and to save him harmless from costs and expenses incident to the action, there nevertheless is nothing there said or intimated which prevents such employé from suing in his own name and behalf if he elects to do so.

By what we have said we do not wish to be understood as holding that it would have been improper if an action had been commenced in the name of the state, or if the commission had been made a party plaintiff also, or if the commission had brought the action in the name of the state for the use and benefit of plaintiff. What we do hold is that such was not necessary, and that this proceeding may be maintained in the name of plaintiff alone. The special demurrer must therefore be overruled.

This brings us to the real controversy between the parties to this proceeding.

The general law of this jurisdiction, as in most other jurisdictions, does not authorize actions for damages for personal injuries against school districts. School dis-

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tricts are corporations with limited powers, and act merely on behalf of the state in discharging the duty of educating the children of school age in the public schools created by general laws. The act creating the commission (Comp. Laws Utah 1917, sections 3061 to 3165, inclusive), which, for the purpose of this opinion, we may and do regard as an employés' compensation act, among other things provides:

"Sec. 3110. The following shall constitute employers subject to the provisions of this title: (1) The state, and each county, city, town, and school district therein."

Then follows a designation of other employers who are subject to the provisions of the act. Section 3111 provides:

"The term 'employé,' 'workmen' and 'operative,' as used in this title, shall be construed to mean: (1) Every person in the service of the state, or of any county, city, town, or school district therein," etc.

In other sections of the act the compensation that shall be awarded by the commission under the act in case the employé is injured in the course of his employment and the manner of its payment are fully provided for. The act also provides for a state insurance fund to which all employers may contribute the rates fixed by the commission and thus insure payment of any compensation that may be awarded to the injured employé. In section 3119 it is provided that—

"Each county, city, town, or school district which is liable to its employés for compensation may insure in the state insurance fund or pay compensation direct."

As before pointed out, the act includes all school districts within its provisions and requires them to compensate their employés in case of injury, but confers the option upon them to contribute to the state insurance fund and insure the payment of compensation from that fund, or to pay the same direct to the injured employé. In case, therefore, any employé of any school district is injured and is entitled to compensation under the act, he, as in all other cases, makes application to the commission for an award of compensation under the provisions of the act, and in case such an award is made and the school district is insured in the state insurance fund the compensation awarded is paid from that fund, but if



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the school district is not insured in that fund it must pay the compensation direct.

Counsel for the board, however, vigorously contend that in view that in neither the act nor in any other statute any provision is made whereby the board is given the power to raise or provide funds for the payment of the compensation contemplated by the act, for that reason it was powerless to provide funds or means with which to pay, and hence cannot pay, the award in this case. In that connection they urge with much force that the funds at the disposal of the board are trust funds and must be devoted strictly to the purposes for which they are raised by the processes of taxation, and to divert them to other purposes would constitute a violation of the trust with which they are impressed. While it is true that the act merely requires school districts to pay the compensation provided for in the act, as before pointed out, and does not provide how the funds to pay the compensation shall be raised, yet that, standing alone, would not necessarily relieve the school district from the power or duty of 4 paying the compensation awarded. Nor would the fact that the school funds partake of the nature of trust funds necessarily prevent the board from paying such compensation as may be awarded under the act. If the money which is paid to a teacher or other employé of the school district under the act is paid for school purposes, that is, for the support and maintenance of the schools, it still would be paid in furtherance of the trust with which school funds are impressed. The question, therefore, that arises, and which we must decide, is, Are there any funds at the disposal of the board out of which plaintiff may be paid the compensation awarded to her by the commission?

The award now has the same legal effect as a judgment against the school district would have. The powers and duties of the board are defined and fully set forth in Comp. Laws Utah 1917, sections 4680, 4681, 4682, and 4683. It is not necessary for us to specially mention or enumerate those duties and powers here. It must suffice to say that under section 4704 the means are provided by which the board may

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raise the necessary funds to discharge the duties imposed upon it by those sections before referred to. Section 4704, among other things, provides:

"The Board of Education shall, on or before the 1st day of May of each year, prepare a statement and estimate of the amount necessary for the *support and maintenance of the schools* under its charge for the school year commencing on the 1st day of July next thereafter." (*Italic ours.*)

Estimates for other purposes are also required to be made, but those are not material here. The estimates when made are required to be filed with the officers whose duty it is to make the tax levies for the ensuing year, and when the levies are made in accordance with the estimates of the board the taxes must be collected by the county treasurer and by him paid to the treasurer of the board. The act under which plaintiff was awarded compensation went into effect on the 1st day of July, 1917. She was injured on February 27, 1919, and the award in her favor was made on the 25th day of July, 1919. It therefore was in full force and effect more than 18 months before plaintiff was injured. The question therefore is, Did or does the board have power to provide funds for the payment of compensation that may be awarded under the act?

Counsel for the board insist that under section 4704, *supra*, it was only empowered to provide funds for "the support and maintenance of the schools," and that the payment of compensation to teachers and other employes in case of injury is not included within the phrase "support and maintenance of the schools." Counsel frankly conceded at the hearing that the words "support and maintenance of the schools" are very broad and comprehensive in their scope and meaning. They insist, however, they are not broad enough nor comprehensive enough to include the compensation provided for in the act. It is also admitted that the only fund from which the board can and does obtain the necessary money to pay premiums to insure the schoolhouses and outbuildings is the fund for the support and maintenance of the schools. Notwithstanding that, however, they insist that that fund cannot be drawn upon to pay the compensation provided by the act. Among the cases that counsel cite and rely upon in support of their

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contention are: *Ford v. School District, etc.*, 1 L. R. A. 607, and notes; *Ernst v. City of West Covington*, 116 Ky. 850, 76 S. W. 1089, 63 L. R. A. 652, 105 Am. St. Rep. 241, 3 Ann. Cas. 882; *State v. Board of School Commissioners*, 94 Md. 334, 51 Atl. 289; *Board of Education v. Volk*, 72 Ohio St. 469, 74 N. E. 646; *Collins v. Henderson*, 74 Ky. (11 Bush) 74. It is not claimed that the foregoing cases are decisive of the question here presented for decision. Indeed, it is but fair to state that in view of the more recent decisions relating to the subject of compensation acts for injured employés they shed little, if any, light upon the question that we must decide. Upon the other hand, the Attorney General and his assistants contend that the phrase "support and maintenance of the schools," when given proper force and effect, is ample in scope and meaning to cover the compensation provided for in the act. It, they insist, certainly was the intention of the Legislature to include all school districts within the provisions of the Compensation Act, and, further, that the act in express terms confers the option on school districts of paying compensation direct or to insure its payment in the state insurance fund. How, they insist, can it successfully be contended that school buildings and outhouses may be insured from the support and maintenance fund but that the compensation for injured teachers and other employés may not be insured from the same fund? When the fact is kept in mind that the support and maintenance mentioned in the statute is not limited to school buildings and outhouses, but in express terms provides for the support and maintenance of the schools, there is much force to the contention. Then again, the compensation provided for in the act is not to be considered in the sense of damages for injuries sustained. It is precisely what the term implies, namely, compensation, pure and simple.

As applicable to ordinary employers the term compensation merely means that the funds provided to pay salaries and wages must be increased so as to meet the claims for compensation, precisely as that would have to be done in case of an increase in salaries or wages or an increase in the number of employés. Compensation, therefore, is merely another term

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for salaries or wages; that is, in case of injury it merely provides for the payment of a special or reduced salary, if we may use that term, as compensation to the injured employé during the term fixed by the act. The fund, therefore, out of which the compensation must be paid in the case of an ordinary employer is the salary or wage fund, while in the case of school districts it manifestly must come out of the support and maintenance of schools fund. In this connection counsel for the board contend that if the support and maintenance fund can be drawn upon to pay compensation then that fund may be exhausted and the schools might have to close. In view that at least a portion of the salaries and wages must be paid out of that fund, the same argument would apply if it became necessary to increase the number of teachers and employés, or if the salaries of the former and wages of the latter were increased. The fund might thus become exhausted to pay the increased salaries and wages and the schools might have to close. If by reason of the law the tax limit is such that a sufficient support and maintenance fund cannot be raised for the support and maintenance of the schools, the duty is with the legislative department to pass laws authorizing school districts to raise sufficient funds. The court may not strike down laws or refuse their enforcement because they may be imperfect or lacking in some detail. It is our duty to enforce the laws as we find them, regardless of what the results in a particular case may be. Keeping in mind all of these matters, can any one successfully contend that in view of the object and purpose of the modern employés' compensation acts support and maintenance for schools includes all the necessary means for the protection and maintenance of school buildings of all kinds but does not include the protection and maintenance of the teachers, whose services are absolutely essential in maintaining schools as educational institutions? Let it be remembered that schools are not, and under the law never were, intended to be maintained for any other purpose than as educational institutions. The teacher, therefore, is, and in the nature of things must be, held to be quite as necessary to the maintenance of schools as educational institutions

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as are the school buildings in which the schools are kept. In view, therefore, that the Legislature in express terms has included school districts in the Compensation Act, and furthermore provided that those districts shall pay the compensation provided for in the act to their employes and gave such districts the option of securing the payment of compensation by insuring in the state insurance fund, or by direct payment thereof, and in view of the construction we have felt constrained to give the several provisions of our statute to which reference herein has been made, the conclusion inevitably follows that the school district represented by the board is liable to the plaintiff for the amount awarded to her by 5-8 the commission, and that such amount is payable out of the funds that are raised by taxation for the support and maintenance of the schools. In so holding we are not unmindful of the fact that the provisions of the statute upon which our conclusions herein are based are not as clear as they might be made. The legislative intention is, however, manifest, that the school districts of this state should comply with the provisions of the act in making compensation to their employes. In view of that fact we may not defeat that intention upon merely technical or trivial grounds. Unless there is some constitutional or other fundamental objection, it is our duty to place such a construction upon the different provisions of our statute as will make the legislative intention effective, unless prevented from doing so by the ordinary rules and canons of interpretation and construction. No constitutional or other fundamental objection has been suggested, and we have discovered no insuperable objection in the rules or canons of construction.

While counsel for both sides have been unable to find any decision in point, and while we by a somewhat thorough independent research have likewise been unable to find any, yet by reference to the statutes of some of the other states and the enforcement of the compensation acts of those states against school districts, it will be seen our conclusions are not entirely without authoritative support. While the cases of *Keenon v. Adams*, 176 Ky. 618, 196 S. W. 173, and *Allen v.*

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*Board of Education, etc.*, 81 N. J. Law, 135, 79 Atl. 101, are far from being in point, yet those decisions have more or less analogy to the case at bar. We, however, do not cite them as authority, but merely as being more or less analogous cases. We shall not pause to review them here. The case of *Elk Grove, etc., District v. Industrial Acc. Com'rs*, 34 Cal. App. 589, 168 Pac. 392, by reason of the California statute, is, however, more nearly in point here. Under the California statute (St. 1909, chapter 116) school boards are required to make estimates for school purposes in form similar to those provided for in our section 4704, *supra*. In the case last above cited a teacher sustained personal injuries in the course of her employment and upon making application therefor was awarded compensation under the California Compensation Act, which, so far as applicable to school districts, is practically the same as our act. Although there is nothing in the California statute, so far as we have been able to ascertain, authorizing the raising of a special fund out of which compensation to injured teachers may be made, the California court, as appears in the decision last cited, found no difficulty in enforcing the payment of the award for compensation to the teacher which was made by the California accident commissioners. The statutes of Michigan (Pub. Acts 1912, page 21), of Minnesota (Laws of Minn. 1913, chapter 467, section 34, subd. g [1]), of Illinois (St. Ill. 1913, chapter 48, section 129), of Iowa (Laws Iowa 1913, chapter 147, section 1, subd. b), of Montana (Rev. Code Mont. vol. 3, page 1070, section 6), so far as compensation acts are made applicable to school districts, are in terms similar to ours, and yet we have not found a case in which it was held that compensation could not be made to an injured teacher or other employé because no special provision was made to raise funds for that purpose. It seems that in those states the money to pay the compensation provided for by the compensation acts is obtained from the support and maintenance funds. While we cannot and do not assert with absolute certainty that such is the case, yet we do assert that the compensation acts of all of the states we have enumerated so far as applicable to school districts are

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in terms like ours, and that, so far as we are aware, no special provisions are made in any of those acts or otherwise to provide for funds for the payment of compensation to teachers. We further assert that we know of no decisions emanating from the courts of those states in which it is held that the compensation acts are not enforceable for the reason that there are no special provisions authorizing the raising of funds for that purpose.

While from what has been said so far the plaintiff must prevail, yet, in view that this is a proceeding by which it is sought to coerce public officers to pay public funds in discharge of an individual claim, we are confronted with another difficulty. This difficulty does not arise from the fact that the claim in question has not been presented to the board duly verified as suggested by the board's counsel. This being a liquidated claim partaking of the nature of a judgment against the school district, the board had no discretion respecting its allowance or payment, provided it had the necessary funds with which to pay. Nor is such a claim subject to be audited as are unliquidated claims against the district. The board is therefore required either to pay or refuse to pay the award as made at its peril. The difficulty, however, arises from the fact that while the plaintiff has entirely omitted to allege that the board has funds with which to pay the award, upon the one hand, the board, upon the other hand, in its answer, has affirmatively and positively averred that it has "no moneys nor funds out of which plaintiff's claim may be paid." This court has repeatedly held that where public officers are sought to be coerced by a writ of mandate to do certain acts the right of the plaintiff to have the act performed must be clear, and the corresponding duty upon the officer to do the required act must be correspondingly clear. The last case in which the doctrine is stated is the case of *Neaf Hamblin v. State Board, etc.*, 55 Utah, 402, 187 Pac. 178, decided at this term, where the authorities are cited. It is not necessary to enlarge upon anything that is there said. Starting out, therefore, with the proposition that in view of all that has been said plaintiff's right to be paid the compensation awarded her

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is clear and beyond dispute, yet, in view that the plaintiff has failed to allege that the board has funds with which to pay, and especially in view of the affirmative averment in its answer that it has no funds with which to pay the 9-11 award, is the duty of the board to pay also clear?

While it is true that a public officer or board may by mandamus be coerced to pay a particular claim, yet it is also true that in order to obtain a peremptory writ of mandate to require an officer or board to pay public funds it must be alleged and, if denied, proved, that such officer or board has funds with which to pay that particular claim. To that effect are all the authorities. See *Farris v. State*, 46 Neb. 857, 65 N. W. 890; *State v. Otoe County*, 10 Neb. 19, 4 N. W. 258; *City of Chicago v. People*, 210 Ill. 84, 86, 71 N. E. 816; 26 Cyc., pages 168, 294, 307, 317, 319. In *State v. Otoe County*, supra, Mr. Justice LAKE, speaking for the Supreme Court of Nebraska, tersely and correctly states the rule thus:

"In a petition for the extraordinary aid of mandamus all the essential facts necessary to entitle the party to the relief sought should be specifically set out. And where, as here, the payment of money by a public officer is the object in view, it must be distinctly shown that there are funds from which the desired payment can be legally made, or the writ will be denied."

In *City of Chicago v. People*, supra, it is said:

"A municipality cannot be held by mandamus to pay money out of a fund when no appropriation for that fund has been made or when the appropriation for that fund has been lawfully exhausted."

It is only the last clause of the foregoing sentence which is material here. The Attorney General and his assistants, however, insist that the averment in the board's answer that it has no funds should be qualified so as to read that it has no funds for the reason that no special provision has been made authorizing it to raise funds to pay the award. They contend that in view of the estimate that the board was required to make to raise funds for the support and maintenance of the schools we should assume that it has sufficient funds with which to pay plaintiff's claim. That, it is urged, is especially so, because it is otherwise clear from the board's answer that it made the foregoing averment only for the reasons we have



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before stated. Even though we were permitted to so qualify the board's positive averment that it is without funds with which to pay plaintiff's claim, yet under all of the authorities that, standing alone, would not cure the difficulty we have pointed out. There still would be lacking the averment that the board has the necessary funds with which to pay. The averments in its answer, regardless of how construed, certainly are not equivalent to an admission on its part that it has funds with which to pay. In what we have said upon the proposition now under consideration we are not unmindful of the expressed desire of counsel for both sides that the principal purpose in view was to obtain an authoritative construction of our compensation act, in so far as it applies to school districts. The failure to allege and prove, or obtain an admission, that there are available funds to pay plaintiff's claim is, however, not merely a technical objection, but it goes to the very root of this proceeding. If there are no available funds with which to pay plaintiff's claim, it could not be legally ordered paid by this court by issuing a writ of mandate, even though her right to have it paid be conceded on all hands. Public officers should not be proceeded against by the extraordinary writ of mandate unless it is clear that they are refusing to comply with some duty imposed by law, and unless it is equally clear from the pleadings that the applicant has the right to have the officer discharge such duty. The facts whether there are funds to pay a particular claim are as readily ascertainable by the applicant as by the officer. The officer, therefore, should not be harassed nor the courts be put in motion unless there are funds on hand, and that fact should be clearly alleged and, if denied, be proved; and unless such be done the courts have no right to issue a writ of mandate. If, however, the board has sufficient funds in the support and maintenance fund for schools to 12 pay plaintiff's claim it should do so, and we have no doubt, in view of this decision, it will do so without being compelled to pay by the issuance of a writ of mandate. By having funds on hand we do not mean that the board must have made a special appropriation to pay compensation, but

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what we mean is that if the board has sufficient money in the support and maintenance of schools fund to pay plaintiff's claim then it has funds with which to pay the same.

In view that no printed briefs have been filed in this proceeding no order for costs will be made. In view, however, of the state of the pleadings which we have pointed out. we are powerless to order a peremptory writ of mandate, and the same must therefore be, and it is, accordingly denied.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

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### HARRIS v. SPEIRS.

No. 3302. Decided January 15, 1920. (186 Pac. 445.)

1. **NEW TRIAL—COURT MAY MAKE ORDER CONDITIONAL ON REMISSION OF PART OF DAMAGES.** In an action for damages, where court grants a motion for new trial on the ground that the judgment is excessive, it may, in its discretion, provide that no new trial will be allowed if within a certain time the plaintiff shall consent to remission of a certain portion of the damages. (Page 479.)
2. **NEW TRIAL—COURT MAY GRANT EXTENSION OF TIME TO CONSENT TO REMISSION OF DAMAGES.** Where court ordered "that a new trial be granted unless the plaintiff, within twenty days from date, consents to a remission of the verdict in the sum of \$2,000," it could, in its discretion, extend the time within which plaintiff might make an election, under Comp. Laws 1917, section 7023.<sup>1</sup> (Page 479.)
3. **NEW TRIAL—PLAINTIFF, EJECTING TO REMIT DAMAGES UNDER CONDITIONAL ORDER GRANTING NEW TRIAL, MUST GIVE NOTICE TO COURT AND DEFENDANT.** Where court denies a new trial, except on the ground of excessive damages, and orders a new trial, unless a remission of a certain amount of damages is made within a certain time, plaintiff, if electing to remit damages, must make the election known both to the court and to the defendant. (Page 479.)

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<sup>1</sup> *Luke v. Coleman*, 38 Utah, 383, 113 Pac. 1023, Ann. Cas. 1913B, 483.

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4. **NEW TRIAL—EXTENSION OF TIME TO ELECT AS TO GRANT OF NEW TRIAL ON CONDITION OF REMITTITUR PROPER.** Where court denied a new trial except on the ground of excessiveness of damages, ordering that new trial be granted unless within twenty days the plaintiff remit a certain amount of the damages, and plaintiff failed to elect within the twenty days, and the order became absolute, the court thereafter could extend the time for making the election, under Comp. Laws 1917, section 6619, where the failure to elect was due to inadvertence and excusable neglect. (Page 480.)
5. **NEW TRIAL—COURT MAY PERMIT PLAINTIFF TO REMIT IN COMPLIANCE WITH CONDITIONAL ORDER THOUGH ORDER HAD BEEN MADE ABSOLUTE.** Where court denied motion for new trial, except on ground of excessiveness of damages, and ordered a new trial, unless plaintiff remit a certain amount of damages within twenty days, and at the end of twenty days ruled that the conditional order had become absolute, the court could thereafter permit plaintiff to remit, under Comp. Laws 1917, section 6619, where it entered the order, declaring the former order absolute, inadvertently, without considering the merits of plaintiff's application for an order denying the motion for a new trial upon the grounds of excusable neglect and inadvertence." (Page 481.)
6. **APPEAL AND ERROR—NO REVERSAL FOR IRREGULARITIES IN PROCEEDINGS ON MOTION FOR NEW TRIAL.** Where the appealing party does not complain of any error occurring at the trial, and it is not claimed that he did not have a fair trial, no irregularity in the proceedings on the motion for new trial culminating in a denial of such motion would be sufficient to authorize a reversal, provided the court had jurisdiction to make the rulings complained of, in view of Comp. Laws 1917, sections 6622, 6968. (Page 482.)

Appeal from District Court of Salt Lake County, Third District; *H. M. Stephens*, Judge.

Action by Florence Harris against Ernest Speirs.

Judgment for plaintiff, and defendant appeals.

**AFFIRMED.**

<sup>2</sup> *Felt v. Cook*, 31 Utah, 299, 87 Pac. 1092; *Tooele Imp. Co. v. Hoffman*, 44 Utah, 532, 141 Pac. 744; *Moyle v. McKean*, 49 Utah, 93, 162 Pac. 63.

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*Olson & Lewis*, of Salt Lake City, for appellant.

*Marioneaux, Straup, Stott & Beck*, of Salt Lake City, for respondent.

FRICK, J.

The facts material to this appeal, in substance, are: The plaintiff commenced this action in the district court of Salt Lake county in December, 1915, praying judgment against the defendant for damages for breach of promise to marry. Defendant answered the complaint by a general denial. The case was tried to a jury, which, on May 3, 1917, returned a verdict in favor of plaintiff for \$5,000 damages. Judgment was duly entered on the verdict. The defendant, in due time, served notice of motion for a new trial upon the usual statutory grounds, among which was the ground that the damages allowed were excessive. The motion for a new trial was argued and submitted to the court on June 28, 1917. On October 5th following, the court overruled the motion for a new trial upon all grounds except that the damages awarded by the jury were excessive, and upon that ground, and on that date, entered an order "that a new trial be granted, unless the plaintiff within twenty days from date consents to a remission of the verdict in the sum of \$2,000, thus reducing the verdict to the sum of \$3,000." On October 20, 1917, plaintiff, through her attorneys, applied for and was given an extension of "fifteen days additional time within which to make an election on motion in the order granting a new trial." Thereafter, on November 10, 1917, counsel for plaintiff, for reasons then stated to the court, obtained an additional fifteen days time "in which to make an election in said case." Thereafter, on November 23, 1917, plaintiff, through her attorneys, served a notice in writing upon defendant's counsel, stating therein that the plaintiff had elected to remit the sum of \$2,000 from the verdict theretofore returned, and in said notice further notified counsel that plaintiff's attorneys would apply to the court for an order denying the motion for a new trial thereto-

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fore filed by the defendant. That application was resisted by defendant's counsel, and on December 1, 1917, the plaintiff was given until December 8th to file affidavits in support of the application aforesaid. Thereafter, on December 6th. and before the expiration of the time within which plaintiff had to file affidavits, her counsel made an additional application for leave to remit \$2,000 from the verdict, which application was made "in pursuance of section 3005, Comp. Laws Utah 1907, and upon the additional grounds of excusable neglect and inadvertence." The reasons for the application are set forth at great length in the affidavit filed in support thereof. We do not deem it necessary to set forth the facts stated in the application. It is sufficient to state that, in view that the facts were in effect conceded by reason of not having been questioned, they were ample to authorize the district court to grant the relief applied for if it had jurisdiction to act. The district court, however, without passing upon the merits of the application and refusing to consider it, and upon the sole ground that it had exceeded its power in granting an extension of time to plaintiff within which to make her election to remit the \$2,000 from the verdict and judgment, ruled that the conditional order granting a new trial had by its terms become absolute. Thereafter, upon a further application pursuant to said section 3005, and upon the grounds of inadvertence and excusable neglect, the court, on April 13, 1918, made an order granting plaintiff leave to remit said \$2,000 from the verdict and judgment theretofore returned and entered in this case, and ordered that judgment be entered against the defendant for the sum of \$3,000 and costs. Defendant prosecutes this appeal from that judgment.

The only errors assigned are: (1) That the court erred in granting plaintiff additional time on October 20, 1917, within which to make her election to remit \$2,000 from the verdict; (2) that the court erred in granting plaintiff additional time on November 10, 1917, for the purposes aforesaid; (3) that the court erred in permitting plaintiff to remit \$2,000; and (4) that the court erred in entering judgment in favor of plaintiff and against the defendant for the sum of \$3,000.

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In support of the first assignment it is insisted that the district court exhausted its jurisdiction and power when it made the first order, granting plaintiff twenty days within which to remit \$2,000 from the verdict. It is contended that when plaintiff omitted or failed to remit within the twenty days fixed by the court the conditional order of the court, granting a new trial unless the remission were made, became absolute on the expiration of the twenty days, and the court had no further jurisdiction in the matter except to proceed to try the case again. In support of their contention counsel cite *Luke v. Coleman*, 38 Utah, 383, 113 Pac. 1023, Ann. Cas. 1913B, 483; *Winningham v. Philbrick*, 56 Wash. 38, 105 Pac. 144; *Brown v. Cline*, 109 Cal. 156, 41 Pac. 862; *Holtum v. Greif*, 144 Cal. 521, 78 Pac. 11. In *Luke v. Coleman* the question involved was this: The district court had denied a motion for a new trial on the 28th day of October. On the 19th day of December following the plaintiff in the case filed a motion, asking the court "to grant a rehearing and reargument of plaintiff's motion for a new trial": (1) Because the court had erred in denying the motion; and (2) because the court had "attached undue weight to the verdict of the jury." What the plaintiff there asked was that the court should hear him again upon the same questions upon which he had already been heard. In other words, all that was asked was that the court review its own former ruling without assigning any cause or reason except that the court had erred. It was accordingly held that the court had exhausted its power in denying the motion for a new trial, and that it did not have the power to review its own rulings upon the sole ground that it had erred in making them. Such is also the effect of the decisions in the cases cited from Washington and California. The only similarity between the cases just referred to and the case at bar is that here, as in those cases, a motion for a new trial was involved. The question presented by appellant's first assignment is therefore manifestly not the same as was the question presented and decided in *Luke v. Coleman* or in the Washington and California cases. The question raised by appellant's first assignment in this case is whether

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the district court had the power to extend the time within which plaintiff was required to elect whether she would remit \$2,000 from the amount awarded her as damages or whether she would submit to a new trial. No one does, or can, contend that the district court did not have the power to make the conditional order and in connection therewith to determine and fix the time within which plaintiff should be required to elect. Nor can anyone successfully dispute the proposition that the time plaintiff should be given to elect was not entirely within the sound legal discretion of the court. It could have fixed any reasonable time limit within which plaintiff should make the election. In view of that fact, why could not the court extend the time limit as originally fixed, on proper application being made for such an extension? In case where a court may fix a time limit within which a party to an action may do an act the determination of which is manifestly within the court's discretion, why has it not the inherent power to extend the time limit as first fixed? We confess our entire inability to perceive any reason why it may not do so. Assuming, however, that the court did not have inherent power to extend the time as fixed in the conditional order, it certainly had the power to do so under Comp. Laws Utah 1917, section 7023, which was in full force and effect when this case was tried and the proceedings therein had. That section, among other things, provides that in "• • • the service or filing of notices other than of appeal, the time allowed by this Code may be extended," etc. Extensions of time by the trial courts when timely application was made have so often been approved by this court that the practice has become elementary. When, therefore, the trial court imposed the duty on plaintiff to elect within twenty days whether 1-3 she would remit \$2,000 from the verdict and judgment as entered or suffer a new trial, she was compelled to make her election known, both to the court and to the defendant. The manner of making it known naturally was by the service of a notice to that effect, precisely as was done by plaintiff's attorneys. Why such a notice does not come within the provisions of section 7023 we are unable to perceive.

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True, the time fixed by the court within which plaintiffs must elect was not a time limit fixed by a statute. If, however, the court may extend the time limit fixed by statute, why may it not also extend the time limit which was originally fixed by the exercise of its own discretion? If it be said, however, that the notice in this case is not within the literal terms of section 7023, yet it is clearly and manifestly within its spirit. It has been held, under a statute precisely like section 7023, that the time limit fixed by the trial court within which an act was required to be performed by a party to the proceeding in ordering a new trial could be extended by the court. *Dickinson v. Smith*, 139 Wis. 1, 120 N. W. 406. The same court also held that relief may be granted in such a case under a section similar to Comp. Laws Utah 1917, section 6619, to which more particular reference will be made hereinafter. *Guaranteed Inv. Co. v. Van Metre*, 158 Wis. 262, 149 N. W. 30, Ann. Cas. 1916E, 554. We are of the opinion, therefore, that the first assignment of error cannot prevail.

It is next assigned as error that the court erred in granting another extension on November 10, one day after the previous extension had terminated. The record, however, shows that that extension was made upon a showing of inadvertence and excusable neglect. By doing that, therefore, the discretion and power of the court were invoked under 4 section 6619, supra, which in express terms provides that a court may grant relief in case of "mistake, inadvertence, surprise or excusable neglect." While the showing upon that application was not as full and complete as it could have been made, as appears from the supplementary affidavits of counsel, yet the showing was sufficient to invoke the discretion and power of the court to act, and it acted upon such showing. This assignment must therefore also fail.

It is next contended that the court erred in granting plaintiff's application to remit \$2,000 from the verdict and judgment as originally entered. That application was also made pursuant to section 6619, and the facts, showing why the election by the plaintiff was not made within the time limit originally fixed by the court, and her excuse for not electing and



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why no prejudice resulted to the appellant by the delay, were full and complete. The statement of facts made was neither questioned nor disputed. True, the court, for the reasons hereinbefore stated, had ruled that plaintiff's election came too late. That ruling was, however, inadvertently made, and without considering her application upon merits. When the court's attention was directed by plaintiff's counsel to the fact that it had acted inadvertently and had ignored the fact that plaintiff's application was in fact based upon the provisions of section 6619, the court set aside the ruling it had thus inadvertently made, and granted the relief prayed for pursuant to said section. We know of no case wherein it was held that the court's action in that regard was 5 without jurisdiction or even improper. Indeed, the Supreme Courts of both California and Washington, upon whose decisions appellant relies, as we have seen, have held that where the application for relief is based upon section 6619, which corresponds to section 473 of the California Code of Civil Procedure, and to section 4953 of Ballinger's Code of Washington, the rule laid down in the cases of *Winningham v. Philbrick* and *Holtum v. Greif* and *Brown v. Cline* does not apply. See *Frost v. Los Angeles Ry. Co.*, 165 Cal. 365, 132 Pac. 443, and *Little Bill v. Dyslin*, 51 Wash. 675, 99 Pac. 1026. In referring to an order granting a new trial upon the condition that the prevailing party remit a specified amount from the verdict Mr. Justice SHAW of the Supreme Court of California, in *Frost v. Los Angeles Ry. Co.*, supra, says "after such an order is made, the court below has no power to change it, *except by proceedings taken under section 473 of the Code of Civil Procedure.* \* \* \*" (Italics ours.) Section 473, referred to, corresponds to our section 6619. To the same effect is the holding of the Washington Supreme Court in the case last referred to from that state. While in those cases the rule laid down in *Luke v. Coleman* is adhered to, yet that rule is limited to cases where no application for relief is made pursuant to section 6619. The very courts, therefore, upon whose decisions the opinion in *Luke v. Coleman* is based, and upon which appellant relies, clearly au-

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thorize the proceedings had in and the ruling that was made by the district court in this case. While we firmly adhere to the rule laid down in *Luke v. Coleman* when limited to the facts and circumstances of that case, yet we say without hesitation that if that decision shall be held to mean what appellant contends for, it would have to be modified, since to thus construe it would disregard and nullify the provisions of section 6619. It has uniformly been held by this court that where a time limit fixed by the statute or by the order of court expired without obtaining an extension, relief may, nevertheless, be had under section 6619. For illustrative cases see *Felt v. Cook*, 31 Utah, 299, 87 Pac. 1092, *Tooele Imp. Co. v. Hoffman*, 44 Utah, 532, 141 Pac. 744, and *Moyle v. McKean*, 49 Utah, 93, 162 Pac. 63.

What has been said also disposes of the other two assignments. We remark that while the proceedings on the motion for a new trial in this case were irregular, yet the district court clearly acted within its power and jurisdiction in granting relief to plaintiff, and in view that it is not contended that errors of law or other irregularities occurred at the trial, and as found by the district court, and that the only defect in the proceedings was that in the judgment of the district court the jury had awarded plaintiff more damages than it thought she should have, which defect was fully cured by the remittitur, it would almost be a travesty of justice to deprive her of the right to enforce her judgment. Moreover, in view that no errors are complained of except the somewhat technical ones herein considered, this court may not reverse the judgment. We have frequently called attention to Comp. Laws Utah, sections 6622, 6968, the first of which provides that the courts must "disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the parties and no judgment shall be reversed or affected by reason of such error or defect"; and the second of 6 which provides "no exception shall be regarded unless the decision excepted to is material and prejudicial to the substantial rights of the party excepting." In view of those sections, and under the decisions of this court, it would be a

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Certiorari. Petition Dismissed.

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difficult matter to find a good reason for reversing a judgment where the appealing party does not complain of any error occurring at the trial, and where it is not claimed that he did not have a fair trial. It would seem that under such circumstances, if the court had jurisdiction to make the ruling complained of, no irregularity in the proceeding on the motion for a new trial culminating in the denial of such motion could be sufficient to authorize a reversal of the judgment by this court.

For the reasons stated the judgment should be, and it accordingly is, affirmed, with costs to plaintiff.

CORFMAN, C. J., and GIDEON and THURMAN, JJ., and MORGAN, District Judge, concur.

WEBER, J., being disqualified, did not participate herein.

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AMERICAN FUEL CO. OF UTAH v. INDUSTRIAL COMMISSION OF UTAH et al.

No. 3432. Decided January 28, 1920. (187 Pac. 633.)

MASTER AND SERVANT—EMPLOYER PROCURING INSURANCE PROVIDED FOR BY WORKMEN'S COMPENSATION ACT NOT RELEASED FROM LIABILITY. Under Comp. Laws 1917, sections 3113, 3114, 3116-3119, and sections 3126 and 3134, the employer is primarily liable for compensation to an employé, and the fact that the employer has complied with section 3114 by insuring payment of compensation does not relieve the employer where the insurer is insolvent; default of either employer or insurer not excusing payment by the other.

Proceedings for compensation by Theras Lappas, employé, opposed by the American Fuel Company of Utah, employer.

Award for claimant, and the employer petitions for a writ of certiorari directed to the Industrial Commission of Utah.

PETITION DISMISSED.

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*Dey, Hoppaugh & Mark*, of Salt Lake City, for plaintiff.

*Dan B. Shields*, Atty. Gen., and *O. C. Dalby*, *James H. Wolfe*, and *H. Van Dam, Jr.*, Asst. Attys. Gen., for defendants.

WEBER, J.

Plaintiff, a corporation under the laws of Utah, procured the issuance by this court of a writ of certiorari directed to defendants. In its petition plaintiff, inter alia, alleges that on April 21, 1919, Theras Lappas filed an application with the Industrial Commission praying for compensation for personal injuries suffered by accident arising out of and in the course of the employment of said applicant by the American Fuel Company, the plaintiff; that on the 26th of September, 1919, a formal hearing was had before the Industrial Commission when the plaintiff appeared and presented evidence showing that it had complied with the requirements of section 3114, Comp. Laws Utah 1917, and had secured compensation to its employes by insuring and keeping insured the payment of said compensation in the Guardian Casualty & Guaranty Company, a stock corporation, authorized to transact the business of workmen's compensation insurance in this state, and that on said date petitioner held a binding policy of insurance in said Guardian Casualty & Guaranty Company executed and delivered to it in conformity with the provisions of the Workmen's Compensation Act; that the policy covered the payment of compensation to all of its employes at its mines at Neslen, Utah, including the applicant, Theras Lappas; that said policy was in full force and effect at the time of said accident, to wit, July 25, 1917; that the Guardian Casualty & Guaranty Company recognized its liability to the applicant and for a considerable period of time made payments to him, as compensation and hospital expense, to an amount in excess of \$550; that the Guardian Casualty & Guaranty Company does not deny its liability, but that said company is in the hands of a receiver; that on October 29, 1919, the Industrial

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Certiorari. Petition Dismissed.

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Commission made and entered its award and order requiring petitioner to pay to the applicant the sum of \$968.95 as compensation for said injuries; that on November 22, 1919, the petitioner made application for rehearing before the Industrial Commission on the ground that the Industrial Commission was without jurisdiction to order petitioner to pay the award and that said commission acted in excess of its powers in making and entering said award.

Defendants have filed a demurrer to the petition on the ground that the facts therein stated are not sufficient to constitute a cause of action. It is the claim of petitioner that by procuring insurance it was relieved from all liability to pay compensation to its injured employé, and that the sole liability to pay the compensation ordered by the commission devolved upon the Guardian Casualty & Guaranty Company, the insolvent insurance carrier.

Comp. Laws Utah 1917, sections 3113 and 3114, are as follows:

"Sec. 3113. If a workman receives personal injury by accident arising out of and in the course of his employment, his employer or the insurance carrier shall pay compensation in the amounts and to the person or persons hereinafter specified.

"Sec. 3114. Employers, but not including municipal bodies, shall secure compensation to their employés in one of the following ways:

"(1) By insuring and keeping insured the payment of such compensation with the state insurance fund; or

"(2) By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the state; or

"(3) By furnishing to the commission satisfactory proof of financial ability to pay direct the compensation in the amount and manner and when due as provided for in this title.

"In the latter case the commission may in its discretion require the deposit of acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred. All stock corporations or mutual associations transacting the business of workmen's compensation insurance in this state under the terms of subdivision 2 of this section shall be subject to the rules and regulations of the commission with respect to rates to be charged, and methods of compensation to be used."

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What is meant by the words "employers shall secure compensation to their employés"? Does it mean they shall obtain an insurance policy and thereby be relieved of all responsibility to the employés who have no voice in making the selection of the insurance carrier? Or does it not plainly appear, both from the letter and the spirit of the law, that the employer "shall secure"—make sure, make more certain—the payment of compensation, leaving the obligation still that of the employer? The primary obligation on the part of the employer is to pay compensation when awarded. Insurance is incidental, though important. It is necessary because employers sometimes fail in business and because payments to injured employés or their dependents are frequently distributed over long periods of time. To make more certain the prompt payment of these awards the insurance feature was provided by the law. In harmony with section 3114 is section 3116, which reads:

"Every policy of insurance covering the liability of the employer for compensation, whether issued by the commission or by a stock company, or by a mutual association authorized to transact workmen's compensation insurance in this state, shall cover the entire liability of the employer to his employés covered by the policy or contract, and also shall contain a provision setting forth the right of the employés to enforce in their own names, either by, at any time, filing a separate claim or by, at any time, making the insurance carrier a party to the original claim, the liability of the insurance carrier in whole or in part for the payment of such compensation; provided, however, that payment in whole or in part of such compensation, by either the employer or the insurance carrier, shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid."

Why provide that the employé file a separate claim against the insurance carrier if the employer is not liable, and why make the insurance carrier a party to the original claim? Why provide that payment, in whole or in part, by either the employer or the insurance carrier, shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid, unless both are liable?

Section 3117 provides:

"Every such policy and contract shall contain a provision that,

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Certiorari. Petition Dismissed.

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as between the employé and the insurance carrier, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier; that jurisdiction of the employer shall, for the purpose of this title, be jurisdiction of the insurance carrier, and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions, and awards rendered against the employer for the payment of compensation under the provisions of this title."

If the employer is relieved from liability when he procures his insurance, why should an award be rendered against him? The employer is the one against whom jurisdiction must be obtained, and the insurance company is bound by the orders and awards against the employer, whose primary liability seems to be recognized by the section just quoted.

Section 3118 reads:

"Every such policy and contract shall contain a provision to the effect that the insolvency or bankruptcy of the employer, and his discharge therein, shall not relieve the insurance carrier from the payment of compensation for injuries or death sustained by an employé during the life of such policy or contract."

Discussing the above section, the Attorney General aptly says in his brief:

"In considering this section the thought immediately occurs why, if the employer is not liable, provide that insolvency or bankruptcy shall not relieve the insurance carrier? If he was never liable, under the plaintiff's theory, why should his insolvency or solvency, bankruptcy or prosperity, make any difference in its effect upon the insurance carrier? This section was inserted to save the situation from the principle that an insolvency or bankruptcy, or a discharge therefrom, of the employer should relieve the insurance carrier. But why should it be necessary to save the situation from such a legal principle if the carrier were, from the beginning, the only and original one liable? Why speak of him not being released on the contingency of the employer being unable to pay because of insolvency or bankruptcy, if the employer was never liable, regardless of him being solvent or insolvent, bankrupt or flourishing?"

Section 3119 is as follows:

"Each county, city, town, or school district which is liable to its employés for compensation may insure in the state insurance fund or pay compensation direct."

If a county, city, town, or school district procures insur-

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ance, it certainly is not absolved from its primary liability to pay compensation, and yet there is no difference as between private and public employers; both are liable for compensation; but the public employer is exempt from the obligation to secure such payment. Otherwise their obligations are the same.

Section 3126 is as follows:

"If a workman who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state as provided for in this title, even though such injury was received outside of this state. If a workman who has been hired outside of this state is injured while engaged in his employer's business, and is entitled to compensation for such injury under the law of the state where he was hired, he shall be entitled to enforce against his employer his rights in this state if his rights are such that they can reasonably be determined and dealt with by the commission and the court in this state."

The provision that the employé shall be entitled to enforce his rights against his employer is another recognition of the principle that the employer is primarily liable for compensation. This thought is emphasized in section 3132, which reads, in part:

"The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employé shall be the exclusive remedy against the employer. \* \* \*"

Section 3134 reads:

"Every employé, or his legal representative in case death results, who makes application for an award, or accepts compensation from an employer, waives his right to exercise his option to institute proceedings in any court. Every employé, or his legal representative in case death results, who exercises his option to institute proceedings in court, as provided in this title, waives his right to any award or direct payment of compensation from his employer."

It will be noticed that this section uses the words "compensation from an employer" and "direct payment of compensation from his employer"—not from the insurance carrier.

Section 3127 provides that employers who comply with the provisions of section 3114 shall not be liable to respond in damages for injuries sustained by their employés not result-



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Certiorari. Award Annulled.

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ing in death. If, by complying with section 3114 and obtaining insurance, relieves the employer from all liability, as contended by plaintiff, why say he "is not liable to respond in damages," leaving the unavoidable inference that he is still liable for compensation?

Reading the statute as a whole, and considering all of its provisions, the plain and unmistakable import of the language of the act compels the conclusion that the right to compensation arises out of the relation existing between employer and employé; that compensation is a tax upon industry or upon the employer's business, a tax that is added to the price of the product and is ultimately paid by the consumer; that the employer is primarily liable for compensation to the employé; that both employer and insurance carrier are liable for the payment of compensation to the injured employé; and that the default of either will not excuse payment by the other.

The demurrer to the petition is therefore sustained; plaintiff's petition is dismissed, and the commission's award is affirmed. Plaintiff to pay costs.

CORFMAN, C. J., and GIDEON and THURMAN, JJ.,  
concur.

FRICK, J., being disqualified, did not participate herein.

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JONES et al. v. INDUSTRIAL COMMISSION OF UTAH  
et al.

No. 3412. Decided January 30, 1920. (187 Pac. 833.)

**MASTER AND SERVANT—EMPLOYÉ ON CO-OPERATIVE THRESHING MACHINE "AGRICULTURAL LABORER" WITHIN WORKMEN'S COMPENSATION ACT.** Where a number of farmers purchased a threshing machine for the purpose of threshing their own grain and used it principally for that purpose, such primary purpose is controlling, and so one employed to assist in threshing operations is an agricultural laborer within the Workmen's Compensation Act, even though grain of others than the owners of the machine was thrashed.

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Jones et al. v. Industrial Commission, 55 Utah 489.

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GIDEON and WEBER, JJ., dissenting.

Original proceedings by David Jones and others for writ of certiorari to the Industrial Commission, to review the proceedings of the commission in awarding compensation for the death of one Joseph Hyrum Rowley.

FINDINGS, CONCLUSIONS, AND AWARD OF COMMISSION SET ASIDE AND ANNULLED.

*Harvey Cluff*, of Provo, for plaintiffs.

*Dan B. Shields*, Atty. Gen., and *O. C. Dalby*, *James H. Wolfe*, and *H. Van Dam, Jr.*, Asst. Attys. Gen., for defendants.

THURMAN, J.

Plaintiffs have applied to this court for a writ of certiorari to review the proceedings of the Industrial Commission of Utah in awarding compensation for the death of one Joseph Hyrum Rowley, which occurred August 13, 1918.

The plaintiffs were the owners of a threshing machine, and Rowley was in their employ when the accident occurred which resulted in his death. The defendant commission, among other things, found that the machine was operated primarily for the purpose of threshing the crops of the owners of the machine, but inasmuch as they were preparing to thresh the crop of a son and renter of one of the owners, and did thresh a part of said crop on the day of the accident, and also threshed for the public during the season of 1918, the commission concluded that the plaintiffs were engaged in commercial threshing, that Rowley was not an agricultural laborer, and that therefore compensation should be awarded to his minor dependents, and funeral expenses allowed. These findings and conclusions are challenged by plaintiffs, and they insist that the commission was without jurisdiction to make the award.

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Certiorari. Award Annulled.

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The statute expressly excludes from its operation "agricultural laborers and domestic servants. Comp. Laws 1917, section 3111, as amended in Session Laws 1919, page 156. .

While many questions are presented by plaintiffs for our consideration, the only question that need be determined is, Was the deceased, Rowley, at the time of his death, employed as an "agricultural laborer" as that term is used in the Workmen's Compensation Act? If he was, the commission was without jurisdiction to make the award; if he was not, the findings and conclusions of the commission are unasailable.

The facts pertinent to a determination of the question are, in substance, as follows: The plaintiffs are all farmers residing in Utah county. Several years ago, having suffered considerable inconvenience and loss in failing to get their grain threshed in due season, they conceived the idea of co-operating together in the purchase of a machine, as found by the commission, primarily for the purpose of threshing their own grain. During the first two or three years, while paying for the machine, they did considerable threshing for the public. After that they did less, and limited their outside threshing generally to crops lying along the route from the farm of one co-owner to another, and on occasions when it would not seriously interfere with the threshing of their own crops. The commission found that they did commercial threshing for the public during the season of 1918, but the undisputed fact is it was not done until after the unfortunate accident to which we have referred. No grain whatever was threshed in 1918 until after the death of Rowley. They were making preparations to thresh on the day of the accident, and the deceased was assisting in the preparations. He was sent with a team and wagon for a tank of water for the engine, and was instructed not to ride on the tank, as it was considered dangerous. He disregarded the instruction, and not only rode on the tank, but attempted to do so by standing thereon, from which position he fell or was thrown, resulting in his death. After his death on the same day plaintiffs proceeded to thresh the grain of one Calvin Meldrum, a son and renter of James

Meldrum, one of the owners of the machine. The grain was grown on the farm of said owner, and he and his son resided together on the farm.

After the accident the owners of the machine, acting upon legal advice, procured insurance under the Industrial Act, and did more or less custom work during the remainder of the season.

The owners of the machine were not formally organized, either as a corporation or voluntary association. Their respective interests were denominated "shares," each share representing a cash contribution of fifty dollars to the purchase of the machine. Together they employed three or four men, who were paid by the owners so much for every hundred bushels threshed. The owners themselves who worked on the machine were paid in the same manner. It is contended by plaintiffs that less than four men were employed by them, but we are of the opinion the commission was justified in finding otherwise.

The number of adjudicated cases respecting questions analogous to the one here presented is exceedingly limited. This should not be a matter of wonder when we consider that workmen's compensation laws are, in most cases, of comparatively recent origin. We have found no case substantially identical in its facts with the present case. The nearest analogy we have been able to find are cases in which threshing machines or other farm machinery have been devoted entirely to custom work for the community, instead of being used principally on the crops of those who own the machine. Even as to those cases there is a marked conflict among the authorities. Some of the cases hold that when a farm machine, such as a hay bailer, corn-shredder, or threshing machine, is used even for custom work, the business is farm work, and the employes employed thereon are farm laborers. Other cases take the contrary view. We find no case whatever which holds that the work is not farming, and the employes not farm laborers, where the machine is used primarily by the owners for use on their own farms. The cases we have reviewed holding that where machines are used for custom work the employes thereon are not farm laborers are as follows:

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Certiorari. Award Annulled.

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*White v. Loades*, 178 App. Div. 236, 164 N. Y. Supp. 1023, in which it is held that a man traveling through the country with a threshing machine and stopping at different farms to thresh grain and beans is not engaged in farming, and his employes are not farm laborers, within the meaning of the New York Workmen's Compensation Act (Consol. Laws, chapter 67).

*Vincent v. Taylor Bros.*, 180 App. Div. 818, 168 N. Y. Supp. 287, in which the court seems inclined to hold to the same effect, although the case was not decided on account of a defective record.

*In re Boyer*, a case from the Appellate Court of Indiana, 117 N. E. 507, in which the facts are substantially similar to those in the New York case first above cited and the holding the same. In the course of the opinion, however, the court says:

"If farmers generally owned threshing outfits and were in the habit of threshing their own grain, and the claimant had been employed by the farmers to assist in the work of threshing, and had been injured while doing such work, a more serious question would be presented."

*Miller & Lux, Inc., v. Industrial Acc. Com. of Cal. et al.*, 32 Cal. App. 250, 162 Pac. 651. This case can be more easily comprehended by the reader by quoting two paragraphs from the headnotes which clearly indicate both the facts and the law as determined by the courts:

"One employed as carpenter and foreman in charge of the construction of a cottage for employes upon one of the numerous properties of a large corporation, chartered, among other things, to construct buildings necessary to its business and whose business had for years included the construction, improvement, etc., of buildings on its properties, requiring the constant employment of carpenters thereon, was employed in the 'usual course of the trade, business, profession, or occupation of his employer' within the Workmen's Compensation Act.

"Such employe did not come within the express exclusion of section 14 of the Workmen's Compensation Act, as one engaged in 'farm labor,' notwithstanding the building which he was engaged in constructing was upon a ranch property of his employer."

*Shafter Estate Co. v. Industrial Acc. Com. of California et al.*, 175 Cal. 522, 166 Pac. 24. For the reasons stated in

the case next preceding, we quote from this case two paragraphs of the syllabus:

"Where plaintiff's decedent was employed to patrol defendant's ranch as gamekeeper, and was also expressly instructed to aid defendant's lessees in killing a deer, and in the course of the hunt he was accidentally shot by one of the lessees, the accident occurred in the course of the employment.

"Workmen's Compensation Act (Acts 1913, page 279, section 14, excluding from the beneficiaries thereof 'any employé engaged in farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising,' does not include a gamekeeper employed to patrol a ranch to eject poachers and to aid in hunting deer."

The California cases can hardly be said to be even remotely in point. It would require an exceedingly strained interpretation of the law to exclude these employés from the operation of the act on the grounds that they were farm laborers.

Defendant also cites the case of *Anderson v. Glen*, Indiana Industrial Board No. 32, as the same appears in the notes to 13 N. C. C. A. 84. This case is pertinent to the point that when a person is employed by employers engaged as independent contractors loading hay, shredding fodder and filling silos as a distinct and independent business the employés are not farm laborers.

It must be conceded that Indiana, as far as its Industrial Board and Appellate Court are concerned, is wedded to the doctrine thus announced. The same may be said of the New York Supreme Court. Neither of these states has determined the question in its court of last resort.

The foregoing cases are the only authorities for defendant that have been called to our attention, or that we have been able to find in our independent research, that are in any substantial sense analogous to the case at bar. On the other hand, the California Industrial Accident Commission has frequently passed upon the question, and has consistently adhered to the doctrine that one employed to operate a machine used as a farming implement is engaged in farm labor even in cases where the machine moves from farm to farm engaged in custom work as an independent business.

*Morris v. Spears*, 1 Decisions Ind. Acc. Com. of Cal. 317, is a case in which the syllabus, consisting of one paragraph

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Certiorari. Award Annulled.

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only, succinctly states both the facts and the law:

"Where an employer owns a hay press which he moves from farm to farm baling hay on contract for the owners of said farms, and his employé is injured while working on the hay press on a farm of a person for whom hay is being baled on contract, such employé is engaged in farm labor at the time of his injury, and his employer is not liable under the Workmen's Compensation Insurance and Safety Act."

To the same effect are *Vincent v. Louis*, 2 Decisions Ind. Acc. Com. of Cal. 168, and *Neimeyer v. Volger*, same volume, page 335. These cases are hay-baling cases, in which the business was carried on in substantially the same manner as in the case of *Morris v. Spears*, supra, and the conclusion of the commission was the same in each case.

*Sylcord v. Horn*, 179 Iowa, 936, 162 N. W. 249 (Supreme Court of Iowa) is a case in which an employé was engaged in the operation of a corn shredder used by the owner as an independent contractor operating the machine for profit. One paragraph of the syllabus correctly reflects the opinion of the court:

"An employé, injured while operating as an engineer and laborer a corn shredder for an employer under contract with a farmer to do such work, was a 'farm laborer' within Workmen's Compensation Act, section 2477m, exempting from the operation of the act an employé who is a farm or other laborer engaged in agricultural work, the fact that the employer was an independent contractor operating a corn shredder for profit being immaterial, since the word 'agricultural' means pertaining to, connected with, or engaged in 'agriculture,' which is the science of cultivating the ground, especially in fields or large quantities, including the preparation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding, and management of live stock; tillage, husbandry, and farming."

*State ex rel. Bykle v. District Court*, 140 Minn. 398, 168 N. W. 130, L. R. A. 1918F, 198 (Supreme Court of Minnesota), is a case exactly in point, except that it goes further than is necessary in support of plaintiffs' contention in the present case. An employé was employed on a threshing machine which the owner and employer moved from place to place, threshing grain for the farmers. The employé, while operating the machine, was injured. He asked for compensa-

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tion, and the court denied him relief. The opinion of the Supreme Court is brief, but strong and to the point. We are constrained to quote it at some length, as it reflects our own views in better form than we are able to do. After citing one or two of the cases to which we have referred, the court, 140 Minn. 398, 399, 168 N. W. at pages 130, 131 (L. R. A. 1918F. 198) says:

"We think the better rule is to hold that plaintiff is a 'farm laborer.' The fact that plaintiff was not in the employ of the owner of the farm is not controlling. The important question is: What is the nature of the work? The work is done upon a farm. It is done upon farm crops. The purpose of growing the crops is to provide food for consumption or market. Threshing is as necessary in order that the farmer may consume or market the crop as is sowing or harvest. Surely, the man who, years ago, threshed grain with a flail was doing farm labor as much as the man who cradled the grain. So is the man who now threshes beans with a flail. The fact that more complicated mechanical devices are used in this case does not change the character of the work. Much farm work is done by the use of complicated machinery. There are tractor plows, self-binders, and even combination harvester-threshers by means of which harvesting and threshing are done as one operation. These and other operations may be done for others by one who is able to own the more complicated and expensive machinery. But it is all, nevertheless, farm work, and the employé who does such work is a 'farm laborer' within the meaning of the Compensation Act. Any other rule would be impractical, and would lead to discriminations that could not be tolerated. This case illustrates this. Suppose the farmer's hired man who was helping plaintiff had also fallen. Both were doing the same work. Surely the hired man was then a 'farm laborer.' It cannot be said that one was a 'farm laborer' and the other was not."

In the instant case we need not go to the full extent to which the Supreme Court of Minnesota and Iowa and the Industrial Accident Commission of California have gone, for, as manifestly appears, the employers in all of those cases were engaged in custom work for the farmers of the community, or, as our own Industrial Board calls it, "commercial business." There is no pretense that owners of the machine in the cases referred to purchased the same primarily for their own use as farmers, or that they were owners of farms upon which the machines could be used. Notwithstanding this the courts and



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Certiorari. Award Annulled.

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commissions referred to held that they were engaged in farming business and their employes, farm laborers.

The illustration made by the Minnesota court in the closing sentence of the excerpt above quoted exactly fits the present case. James Meldrum was one of the owners of the machine in question. He also owned a farm. His son Calvin resided with him on the farm and as a renter was interested in the grain to be threshed. Their grain was in separate stacks on the farm. The position of defendants in respect to the business, in the last analysis, logically leads to the conclusion that while threshing the stack belonging to the son the employes were not "agricultural laborers" within the meaning of the act, and therefore were entitled to compensation at the expense of their employer, but that when they turned to the stack belonging to the father and commenced to thresh they immediately became "agricultural laborers," and were not entitled to compensation. Such an interpretation of the meaning of our Industrial Act, in the opinion of the court, is inadmissible and would result in manifest discrimination and lead to inevitable confusion.

It is not necessary in the present case, nor is it our intention, to go to the extent that some of the cases have gone. We deem it more prudent to deal with such cases when they are presented for our consideration. We hold, however, that in the case at bar, the commission itself having found that the owners of the machine purchased the same primarily for the purpose of threshing their own grain and used it principally for that purpose, such primary purpose becomes controlling in determining the nature and character of their business within the meaning of the Industrial Act.

For the reasons stated the findings, conclusions, and award made by the defendant commission are set aside and annulled. No costs are allowed in this proceeding, for the reason that no printed briefs were filed or costs of a similar nature incurred.

CORFMAN, C. J., concurs.

FRICK, J.

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I unhesitatingly concur in the conclusions reached by my Associate, Mr. Justice THURMAN. The statute excepts all "agricultural laborers." The exception includes all persons engaged in the pursuit of agriculture. If, therefore, one who is engaged in threshing grain which is produced upon our farms is engaged in agricultural work, he is not within the provisions of our Industrial Act. It is conceded by the Industrial Commission, and by all concerned in this proceeding, that in case a farmer threshed his own grain with his own threshing machine he and all others who are assisting him are engaged in agriculture, and are thus excepted from the act. The commission, however, held that where grain is threshed by farmers or others for toll or hire the owner of the machine and those he employs to help him are not engaged in agriculture. In other words, if A. pitches bundles to a threshing machine which is owned and operated by a farmer in threshing his own grain, then A. is engaged in agriculture, and does not come within the provisions of the act; but if he pitches bundles to the same machine when it is used for threshing grain for toll or hire for farmers who pay toll, then he is not engaged in agriculture, and comes within the provisions of the act respecting compensation. According to this view, it is not the nature of the work which determines one's calling, but that is determined by the fact that the work is done by a particular person and is compensated for in a particular manner. If, therefore, a farmer purchases a tractor and gang plows, and plows his own fields therewith, he is engaged in agriculture, but if he uses the tractor and plows in plowing his neighbor's fields for a stipulated price per acre he is not engaged in agriculture. To so hold is to make a distinction where there is no difference, and attempt to classify a calling, the classification of which is purely arbitrary and without a proper reason or foundation. In my judgment the threshing machine, if used for threshing grain, and the plows, if used to plow the farmers' fields, howsoever or by whomsoever used, are merely agricultural implements used in the pursuit of agriculture or farming. Moreover, if a classification of agricultural laborers is legally permissible without

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discrimination, it must be made by the Legislature, since classification is a legislative and not a judicial function. As I view it, threshing grain produced on our farms or ranches, in the nature of things, belongs to agriculture just as much as plowing these farms or ranches does, and it is utterly immaterial by what method or by whom the threshing or plowing is done.

This case, in principle, is entirely different from the case of *Chandler v. Industrial Commission*, 184 Pac. 1020, recently decided by this court. In that case it was sought to except an employer and an employé from the provisions of the act each of whom belonged to a class which was clearly intended to be and was within its provisions. It was therefore not only proper, but was necessary, to apply the provisions of the act liberally so as not to exclude any member of a class which, manifestly, was intended to come within the provisions of the act. Here, however, the reverse is sought. What is attempted here is to bring an employé within the act who belongs to a class which is expressly excepted therefrom. Again, the attempt here is to segregate agricultural laborers into classes, which may not be accomplished by judicial construction, but if permissible at all without discrimination must be brought about by legislative action. But it is urged that even those engaged in pitching bundles to a threshing machine may, under certain circumstances, be classified. The contention is based upon the ground that it is possible to classify those who are engaged in domestic work such as house and window cleaning when done under special contract. While the question of who are and who are not "domestic servants" within the purview of the act is not before us, and hence may not be decided, yet it is quite clear that if one were engaged in house and window cleaning under a special contract he would necessarily be an independent contractor, and hence would not come within the provisions of the act. The Legislature, in making its classification, has, however, used the comprehensive term of "agricultural laborers" in referring to the class now under consideration, while in referring to the class engaged in domestic service it has used the restrictive term of

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"domestic servants." All are aware that one may be engaged in house and window cleaning without being a domestic servant, while we also know that one cannot be engaged in any kind of farm work without becoming an "agricultural laborer." That term would apply even to an independent contractor engaged in farm work.

It is, however, further said that the deceased was not engaged in pitching bundles, and hence it seems to be assumed he is covered by the act. If that were so, then instead of dividing those engaged in threshing grain into two classes, as was done by the commission, they would have to be divided into three classes. In making that contention, therefore, the difficulty is increased rather than solved. The fact, however, still remains that if agricultural laborers may be classified it should be done by the Legislature and not by the courts.

GIDEON, J. (dissenting).

It appears without contradiction that on the date of the accident the deceased and other workmen were engaged in taking the machine in question from the shed where it had remained during the winter months and were making the necessary repairs thereon for the season's work. The deceased had been employed to accompany the machine as a pitcher. On the day in question he was assisting in the repair work, as above indicated.

Among other things, the commission found:

"The pitchers were men employed to throw grain into the machine. They traveled with the machine, were paid by the machine company, and were under the supervision of the foreman, all receiving pay on a percentage basis of the amount threshed. In case the toll taker failed to collect all tolls due, the machine crew were, nevertheless, paid for actual work performed, while the co-owners suffered the loss. It appears that in no case during the season of 1918 did the farmer furnish pitchers; also pitchers were expected to assist in moving and setting up the machine."

The provisions of the Workmen's Compensation act in force at the time of the accident, so far as material to the question under discussion, are:

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"The term 'employé,' 'workman,' and 'operative,' as used in this title, shall be construed to mean:

"1. \* \* \*

"2. Every person except agricultural laborers and domestic servants in the service of any person, firm, or corporation, employing four or more workmen or operatives regularly in the same business."

Comp. Laws 1917, section 3111.

Under the findings of the commission, and as abundantly supported by the testimony, the deceased was employed by the threshing machine company, and was in no way under the direction or orders of the owner of the farm. He was not employed to do any of the usual labor required of a farm hand. His sole duty seems to have been to assist the owners of the threshing machine in operating such machine. The term "agricultural laborers," considered in its most comprehensive sense, might consistently be construed to embrace one engaged as was the deceased. The object of the general act and the phraseology of the section under consideration, however, do not warrant such interpretation. The language excluding such laborers from the general class mentioned in the act is contained in an exception. Without such exception, undoubtedly, all agricultural laborers would be entitled to the benefits of the act. "We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any exception must establish it as being within the words as well as within the reason thereof." *U. S. v. Dickson*, 15 Pet. 165, 10 L. Ed. 689. The office of a proviso and of an exception to a general statute is similar and subject to the same rules of construction respecting the meaning of such proviso or exception. *Black, Interpretation of Laws* (2d Ed.) chapter XL. It is provided by Comp. Laws Utah 1917, section 5839:

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"The revised statutes establish the law of this state \* \* \* and their provisions \* \* \* are to be liberally construed with a view to effect the *objects* of the statutes and to promote justice." (*Italics mine.*)

Admittedly, the object sought by the Industrial Commission Act is to insure to employes engaged in the industries of this state compensation for accidents, and also compensation to the dependents of such employes where death is caused by such accidents. The state, as well as dependents, is vitally interested in having such compensation paid. *Reteuna v. Ind. Com.*, 185 Pac. 535. I am of the opinion that by the exception the intent of the Legislature was to exclude only such laborers as are connected with the everyday or ordinary operation of the farm; that is, any one employed to perform the usual work required on a farm owned or operated by some one in the actual business of farming. The purposes sought by the act, and the phraseology employed in expressing the intent of the Legislature, warrant such construction.

It is suggested in the concurring opinion of Mr. Justice FRICK that any one pitching bundles to a threshing machine, whether employed by the farmer or by the owner of a machine doing commercial threshing, is nevertheless in the same work, and must be included within the exception. That does not, in my judgment, necessarily follow, nor is it controlling. To illustrate: Take the facts in one of the cases relied upon by counsel for plaintiff—*Rheam v. Wharton*, 2 Pa. Work, Com. Board, 326. In that case the deceased was employed by the defendant who was engaged exclusively in farming. At the time of the accident the deceased was driving a team and wagon loaded with lumber to be used in constructing a new cornerib on one of the farms owned by the defendant. The claim was disallowed. The commission held that the deceased was engaged as a farm laborer. I doubt if any one would contend that if the deceased had been engaged by an independent contractor who had agreed to construct a cornerib on one of defendant's farms, he would have been considered a farm laborer. Nevertheless, he would have been engaged in the identical work he was doing at the time of the accident. I apprehend that, it could not be successfully maintained be-

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fore any court that any one employed by another engaged in going from house to house operating a vacuum cleaner, or washing windows, where the contractor was under contract to clean carpets and wash windows of a family residence, and such employé was injured while engaged in such work, such injured employé would fall within the exception as a domestic servant. Cleaning carpets and washing windows is work essential to and intimately connected with, and part of the necessary work in maintaining a home, and is work that may be, and usually is, performed by either the housewife or domestic servant. No reason is given—not even suggested—whereby it is concluded that the Legislature in the exception under consideration used the term “agricultural laborers” in a comprehensive sense and “domestic servants” in a limited or restricted sense. Both are included in the exception to the general class mentioned in the statute.

The nature of the general employment, in my judgment, largely, if not wholly, determines the class to which the employé belongs. In the present case the deceased, at the moment of the accident, was not pitching bundles into the machine—on the contrary, he was driving a team hauling a tank partly filled with water. The work of hauling water may or may not be agricultural work. It is governed and depends upon the general employment. Any one employed to do general farm work may well be held to be engaged in agricultural labor while hauling water for stock or other farm purposes. On the other hand, one employed to haul water for the purpose of running an engine to operate a drill boring for oil on the same farm would not be an agricultural laborer. The work is identical, and the same means are employed in both cases.

The majority opinion, as I understand it, distinguishes the plaintiffs in this case from parties engaged strictly in commercial threshing. In my judgment the facts do not warrant such distinction. The outfit was not owned in equal shares by the plaintiffs. One of the parties owned at least twelve shares, another six, and still others only one. Each owner paid the same per bushel for threshing his grain as a nonowner did.

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At the end of the season any profit was prorated to the several owners as represented by the number of shares held in the enterprise; that is, each man received his part of the profit accruing to the company according to the investment made. Apparently, a strictly commercial enterprise. The fact that this machine happened to be owned by a number of farmers is, in my judgment, wholly immaterial. If a number of farmers jointly and equally owned a machine for threshing their own grain, and each furnished the necessary help to thresh his grain, a different question would be presented. This record presents no such question.

The following cases are cited in support of the views indicated: *White v. Loades*, 178 App. Div. 236, 164 N. Y. Supp. 1023; *Vincent v. Taylor Bros.*, 180 App. Div. 818, 168 N. Y. Supp. 287; *O. L. Shafter Estate Co. v. Industrial Acc. Com.*, 175 Cal. 522, 166 Pac. 24; *Miller & Lux, Inc., v. Industrial Acc. Com.*, 32 Cal. App. 250, 162 Pac. 651; *In re Boyer* (Ind. App.) 117 N. E. 507.

The rulings of the California commission are cited in the majority opinion. They hold, broadly, that threshing grain by farmers, whether for themselves or others, is agricultural labor, an extreme to which few commissions and fewer courts have gone. On the other hand, the Iowa commission has held that parties grinding sugar cane for farmers are not agricultural laborers. If, however, decisions by compensation or industrial insurance commissioners are to be regarded as persuasive there is no reason for rejecting the decision of the Utah commission in the present case. The Industrial Commission of Utah has made a study of conditions in this state; it has made a survey of the industrial situation here. The Industrial Commission law is of recent enactment. The present commission constitute the first appointees to such body. They were residents of the state at the time of the enactment of the law; they were familiar with the propaganda in favor of its enactment; they were familiar with its legislative history, and were conversant with the public discussions and debates that preceded its enactment. In determining a question like the one in this case, concededly close, and one that



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may be termed "a border line case," the opinion of our commissioners is entitled to serious, if not binding, consideration.

I am authorized to say that Mr. Justice WEBER concurs in this dissent.

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PETERSON v. EVANS, Judge, et al.

No. 3423. Decided February 28, 1920. (188 Pac. 152.)

1. **MANDAMUS—WILL LIE TO COMPEL DISTRICT JUDGE TO BRING CAUSE TO TRIAL.** Mandamus will lie to compel a district judge to take steps necessary to bring a cause to trial, where he has improperly suspended proceedings by reason of plaintiff's failure to pay costs of a prior action, under Comp. Laws 1917, sections 7391, 7392.<sup>1</sup> (Page 507.)
2. **COSTS—NEW ACTION HELD NOT PRESUMPTIVELY VEXATIOUS SO AS TO STAY SECOND ACTION UNTIL PAYMENT OF COSTS.** Where an action is dismissed without prejudice, a second action commenced, within due time, under Comp. Laws 1917, sections 6484, 6848, 6859, is not presumptively vexatious, and the trial court cannot, in the absence of a showing that the second suit is in fact vexatious, grant an order suspending further proceeding in the cause until payment of a judgment for cost rendered in the first case. (Page 517.)

Mandamus by Bengt A. Peterson to compel *P. C. Evans*, as District Judge of Salt Lake County, to take steps to bring a certain cause to trial.

ALTERNATIVE WRIT MADE PERMANENT.

*Marionaux & Beck*, of Salt Lake City, for plaintiff.

*Dickson, Ellis & Lucas*, of Salt Lake City, for defendants.

CORFMAN, C. J.

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<sup>1</sup> *Ketchum Coal Co. v. Pleasant Valley Coal Co.*, 50 Utah, 395, 168 Pac. 86; *State v. Hart*, 19 Utah, 439, 57 Pac. 416.

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This is a proceeding in mandamus. Plaintiff made application for an original writ of mandamus to issue from this court commanding the defendant P. C. Evans, as district judge of Salt Lake county, to proceed to rule and take such steps as may be necessary to bring a certain cause to trial brought by the plaintiff in said court against the defendants Utah Copper Company and Charles Shaw. An alternative writ was issued. The defendants have appeared and filed herein a general demurrer, return, and answer to the plaintiff's application. For convenience we shall hereinafter refer to the parties as plaintiff, defendants, and district judge.

The admitted facts are: On November 15, 1917, the plaintiff commenced an action by filing a complaint in the said district court of Salt Lake county against the defendants for the recovery of damages alleged to have been sustained by him through the negligence and carelessness of the defendants while he was in the employ of the defendant Utah Copper Company. The defendants answered, and thereafter said cause, designated in said court as case No. 24169, was brought on for trial before a jury. At the trial, after plaintiff had introduced his testimony and had rested his case, defendants moved for a nonsuit. The motion was opposed by plaintiff. The district judge, after taking the motion under advisement, caused a judgment of nonsuit to be entered and the plaintiff's complaint to be dismissed without prejudice. Thereupon the defendants, in due time, prepared, served, and filed a memorandum of their costs and disbursements in said cause No. 24169 amounting to the sum of fifty-five dollars and twenty cents, for which judgment was duly docketed against the plaintiff in favor of the defendants. Thereafter, May 25, 1918, the plaintiff commenced a new action in said court by filing a complaint against the defendants in conformity with the rulings and decision of the district judge on said motion for nonsuit in said former cause No. 24169, involving, however, the same issues and alleging the same liabilities on the part of the defendants as before alleged. In conjunction with the filing of the latter complaint the plaintiff filed an affidavit of impecuniosity to the effect that, owing to his poverty, he

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was unable to bear the expenses of the new suit thus commenced, designated in said court as case No. 25064. Thereafter, June 14, 1918, the defendant Utah Copper Company filed in cause No. 25064 a general demurrer to the complaint and also its demand, supported by affidavit, for the unpaid costs in the former cause, No. 24169, and thereupon moved the court for a stay of proceedings until such costs shall have been paid by plaintiff. Thereafter, June 26, 1918, the plaintiff duly noticed the defendants of his intention to call up said demurrer to the complaint, and July 6, 1918, the said district judge entered an order that the hearing on said demurrer be continued without date. Thereafter, July 31, 1918, the district judge caused an order to be entered granting defendant's said motion to suspend further proceedings in said cause No. 25064 until payment of costs taxed against plaintiff in the former cause No. 24169 shall have been made. Thereupon plaintiff instituted the present proceeding.

It is first contended by the defendants that mandamus will not lie in the present suit; that the order of the district judge complained of by the plaintiff wherein the proceedings in cause No. 25064 are stayed until payment of the costs in cause No. 24169 shall have been paid is in effect a final judgment, and therefore the plaintiff's remedy is by way of appeal rather than by mandamus proceedings, as was held by this court under the facts disclosed in the case of *Ketchum Coal Co. v. Pleasant Valley Coal Co.*, 50 Utah, 395, 168 Pac. 86, and other cases cited in defendants' brief.

In view of the facts hereinbefore stated, without pausing to here cite or discuss the many decisions of this court referred to in defendants' brief bearing on the question, 1 we are clearly of the opinion that they have no application in the present case, and that mandamus is the proper remedy. The facts and circumstances in the Utah cases cited and relied on by the defendants are entirely dissimilar.

Under our statute (Comp. Laws Utah 1917, section 7391) it is provided that a writ of mandate may be issued to an inferior tribunal "to compel the performance of an act which the law specially enjoins as a duty resulting from an office,

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trust, or station; or to compel the admission of a party to the use and enjoyment of a right \* \* \* to which he is entitled and from which he is unlawfully precluded by such inferior tribunal." The plaintiff contends that under the mandates of our organic and statutory laws he is being denied a substantial right, the right to prosecute a meritorious action, a right which the law specifically accords to him; further, that he has no "plain, speedy, and adequate remedy in the ordinary course of law." Comp. Laws Utah 1917, section 7392; *Craig et al. v. Norwood*, 61 Ind. App. 104, 108 N. E. 395; *Weile v. Sturtevant*, 176 Cal. 767, 169 Pac. 688; Merrill on Mandamus, sections 203, 204; *State v. Hart*, Judge, 19 Utah, 438, 57 Pac. 416. In the case last cited it is said:

"It is now well established that, when an inferior court has refused to entertain jurisdiction on some matter preliminary to a decision of a case before it on the merits, or refuses to act when the law requires it to act, or where, having obtained jurisdiction in a case, it refuses to proceed in the exercise thereof, a writ of mandamus is a fitting and proper remedy to set such court in motion and to speed the trial of a case so as to reach the proper end, when no action below was had on the merits; but such writ will not lie to an inferior court to correct alleged errors occurring in the exercise of its judicial discretion."

The real bone of contention between the parties to this proceeding is whether or not, in view of our Constitution and statutes, the district court had the power to exercise its judicial discretion in making the order complained of by plaintiff. Our state Constitution (section 11, article 1), to which plaintiff directs attention, provides:

"All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party."

Provisions of like import are to be found in the Constitution of the several states. Counsel cites us to no case, and, so far as we have any knowledge, none can be found, holding that the provision referred to abrogates any rule of procedure promulgated by the courts for the proper administration of the

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law and justice between the parties before them when in accord with the long-established practice of courts, either of law or equity. To the contrary, it has always been held, regardless of express statutory authority, that courts of general jurisdiction have the inherent power to make and enforce all necessary rules and orders calculated to enforce the orderly conduct of their business and secure justice between parties litigant. The exercise of such powers does not mitigate against nor infringe upon the constitutional right of any person to an open court for the redress of grievances, nor does it unnecessarily delay or operate as a denial of any remedy to which a litigant is entitled by due course of law. 12 C. J. 1011; *McAuslan v. McAuslan*, 34 R. I. 462, 83 Atl. 837; *Knee v. Railway Co.*, 87 Md. 623, 40 Atl. 890, 42 L. R. A. 363; *Shear v. Box*, 92 Ala. 596, 8 South. 792, 11 L. R. A. 620; *Lowe v. Kansas*, 163 U. S. 81, 16 Sup. Ct. 1031, 41 L. Ed. 78; *Brown v. Wightman*, 47 Utah, 31, 151 Pac. 366, L. R. A. 1916A, 1140. Concerning these constitutional provisions this court, speaking through Mr. Justice FRICK in the case last above cited, has said:

"The courts have, however, always considered and treated those provisions, not as creating new rights, or as giving new remedies where none otherwise are given, but as placing a limitation upon the Legislature to prevent that branch of the state government from closing the doors of the courts against any person who has a legal right which is enforceable in accordance with some known remedy. Where no right of action is given, however, or no remedy exists under either the common law or some statute, those constitutional provisions create none."

It is argued by the defendants, and we think it is generally conceded, that by the overwhelming weight of authority courts of general jurisdiction had the discretionary right at common law to stay the proceedings in a second action for the same cause between the same parties until the costs in the first suit in which plaintiff failed had been paid. The practice had its origin in the English courts in actions of ejectment where judgment in one suit was not a bar to subsequent suits to try the same title. In theory the power was conferred on equitable principles and the duty of the courts to so control

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their own proceedings so as to preclude them from becoming the means of oppression and affording avenues for repeated and vexatious litigation at the hands of unscrupulous parties. In 15 C. J. section 743, page 301, where many authorities are collated in the footnotes, it is said:

"The practice of enforcing payment of costs awarded by a final judgment by staying a second action based on the same cause of action originated in ejectment suits, but the scope of the rule was subsequently enlarged, and now embraces all classes of actions, but may not embrace special proceedings. The power to grant a stay is equitable in its nature, and does not depend exclusively on the question whether the collection of costs can be enforced by execution; and in exercising the power the courts have in view the twofold object of compelling payment of costs, and preventing vexatious litigation. The power to grant a stay to enforce payment of costs of a former suit for the same cause of action exists at common law and is a rule of practice which obtains in practically all jurisdictions unless forbidden expressly or impliedly by some statute."

We may remark that the rule obtains in many jurisdictions by reason of express statutory enactment, as, for example, in New York under Code of Civil Procedure, section 779; in others under the common-law practice alone, as in Washington. *Schwede v. Hemrich*, 29 Wash. 124, 69 Pac. 643.

However, it must be kept in mind that the objects of the rule are primarily to preclude the abuse of the court's processes by preventing needless and vexatious litigation, and particularly as a means of intimidation or extortion. In the present case, as we have pointed out, the second action was brought in forma pauperis. Simultaneously with the filing of his complaint plaintiff filed an oath that he was impecunious and unable to bear the expense of the action, in conformity with the provisions of Comp. Laws Utah 1917, section 2577, which reads:

"Any person may institute, prosecute, defend, and appeal any case in any court in this state by taking and subscribing, before any officer authorized to administer an oath, the following:

"I, A. B., do solemnly swear (or affirm) that owing to my poverty I am unable to bear the expenses of the action or legal proceedings which I am about to commence or the appeal which I am about to take, and that I verily believe I am justly entitled to the relief sought by such action, legal proceedings, or appeal."

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It is argued and contended by the defendants that the statute just quoted has nothing to do with the power of the court to exercise its discretion by granting a stay of proceedings until the costs of the former action shall have been paid by the plaintiff; that the mere pecuniary inability of the plaintiff to pay costs in the second action did not absolve him from paying the costs in the first action, nor deprive the district court from exercising its discretionary power to stay proceedings until the costs awarded against the plaintiff in the first action shall have been paid. In the abstract we think the defendants are right in their contention. However, the rule contended for is not applicable in all cases. It must be kept in mind the very purpose of the rule contended for is to preclude the abuse of the court's processes and insure complete justice as between the parties before it. We do not understand the rule to be a universal one in its application, although it has been generally adhered to and applied both under the common law and the statutes upon proper application where a new suit has been commenced on the same cause of action between the same parties without payment of the costs of a former suit. If, however, under the facts of a given case one party or the other is by the enforcement of the rule unjustly precluded from prosecuting his just claims, or making a proper defense to the second suit brought, it at once destroys the equality of the parties before the law, and undermines the whole superstructure upon which our American jurisprudence is founded. Therefore no hard and fast rule can be laid down that will be controlling in every case. It follows, however, from what has been said that mere non-payment of costs will not in all cases justify a stay of proceedings. In the absence of some showing made that under the facts and circumstances of a particular case the court's processes are being abused or the suit is sought to be oppressively or vexatiously prosecuted, we think the rule should not be applied. Undoubtedly the courts have the inherent power to exercise their discretion when an action is shown to be oppressive or vexatious in character or when their attention is called to a proper case for so doing. We do think, however,

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that under the facts and circumstances disclosed by the record here such a case was not presented nor was there any proper showing made before the district court to invoke its discretionary power to order a stay of proceedings.

In the first suit the plaintiff was nonsuited for some reason not apparent to us, as the record in that regard is not brought before us, but presumably the nonsuit was ordered for just and legal reasons. Under the provisions of our Code of Civil Procedure plaintiff after nonsuit had a perfect right to commence his action anew within the time limited by Comp. Laws Utah 1917, section 6484. At the commencement of the second action it was stated by affidavit in due form that the plaintiff was impecunious, and therefore unable to pay costs. It was also stated that he was justly entitled to the relief sought against the defendants. There was absolutely no showing made whatever, except the bare fact of nonpayment of costs of the former action, that his second action was oppressive or vexatious in character, or that he did not have a meritorious cause of action against the defendants. The only contention therefore that can be made in justification of the court's order granting a stay of proceedings was the affidavit on the part of the defendants stating that the plaintiff had been nonsuited in a former action, and that the costs awarded against him in defendants' favor had not been paid. The effect of the court's order was, by reason of plaintiff's financial inability to pay costs, to leave him stripped of the only way he could proceed to prosecute his second action against the defendants, no matter how meritorious were his demands. The ruling of the district court under the admitted facts and circumstances, as we view it, was inconsistent with the spirit of both the common law and our Code of Civil Procedure permitting a poor person, upon a proper showing, to sue in forma pauperis. Let it be said that under the circumstances it is generally held that the second suit is presumptively vexatious; yet the fact remains that, no matter how just and meritorious plaintiff's cause of action against the defendants may be, plaintiff, a poor person, is not to be permitted, under the ruling of the district court complained of, to proceed without



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paying the costs of the first suit. If the plaintiff's oath or affidavit of impecuniosity and that he is justly entitled to the relief sought is not to be regarded as removing the presumption of vexatiousness, then the only logical conclusion to be arrived at under the showing already made, and the only showing that can be made by plaintiff, is that he is not to be permitted to prosecute his claims against the defendants in our courts. We can but conclude that under the showing made by plaintiff such is neither the spirit nor intent of the law.

It is our opinion that under the facts and circumstances of the case presented the plaintiff is being denied a substantial right and should be permitted, under the showing made by him, to proceed in the district court with his suit against the defendants before payment of the costs of his former action.

It is therefore ordered that the demurrer herein be overruled, and, further, that a peremptory writ of mandate issue. Plaintiff to recover costs against defendants.

FRICK, J.

While I fully concur in the conclusions reached by the Chief Justice, yet, in view of the provisions of our statute to which I shall more specifically refer hereinafter, I feel constrained to place my concurrence upon somewhat broader grounds than those upon which the Chief Justice bases his conclusions. I do so: (1) Because in my judgment our statute not only warrants but requires it; (2) because it appears from the decision of the district court, which is in the record, and from the order entered in this case, that the order is based entirely upon a presumption which is enforced in all cases where a second action is commenced in all of the departments of the district court of Salt Lake county, which presumption, in view of our statute, is, in my judgment, without any foundation; and (3) because counsel for both sides have presented the case upon that theory.

The question of whether a second action may or may not be commenced unconditionally by any one without being sub-

jected to the assumed presumption is therefore squarely before us, and, in order to settle the question, should be unconditionally decided.

Referring now to the first contention, namely, that mandamus is not the appropriate remedy: That contention, in my judgment, is clearly without merit. The record conclusively shows that the district court, pursuant to the defendants' motion, merely entered an order suspending further proceedings in the action until the costs taxed in the first action "shall have been paid." The action was therefore not dismissed nor was a judgment of dismissal entered. All that was done was to suspend further proceedings therein. Such an order, under our practice, is not a final judgment from which an appeal can be taken. The only remedy available to the plaintiff, therefore, was to apply for a writ of mandate to require the district court to proceed to try the second action. While counsel for defendants have cited a number of cases wherein it is held that appeal, and not mandamus, is the proper remedy, yet in all of the cases cited it appears that the courts had entered judgments finally dismissing the actions. If in this case a final judgment dismissing the action had been entered, there would be much force to counsel's contention that appeal is the proper remedy. In this case all that was done, however, was to enter an order suspending further proceedings until such time as plaintiff shall have paid the costs taxed against him in the first action. Such an order is not a final judgment, and hence plaintiff was powerless to proceed further until that order was modified or set aside. A writ of mandate to require the district court to vacate the order suspending proceedings and to proceed with the trial of the case was therefore a proper, and in my judgment the only, remedy plaintiff could invoke.

Recurring now to the second proposition, namely, that the plaintiff must fail in this proceeding for the reason that the order made by the district court was one within its discretion, and hence cannot be controlled by mandamus: That contention is, in my judgment, likewise untenable. Many cases are cited by defendants in support of the foregoing proposition.

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The basis of all of those decisions is that in case the plaintiff is nonsuited, or if he voluntarily dismisses his action, and thereafter commences another action against the same defendant for the same cause of action, the second action is presumptively vexatious; that is, a presumption prevails against the plaintiff that his second action is vexatious, and hence it is within the discretion of the trial court to require him to pay the costs taxed against him in the first action before permitting him to proceed with the trial of the second one. In my judgment the weight of authority is to the effect that, where the first action fails otherwise than upon the merits, and a second action is commenced upon the same cause of action and against the same defendant, the second action is presumptively vexatious. In view of that presumption it is held in those cases that the trial court may in its discretion refuse to proceed with the trial of the second action until the costs taxed against the plaintiff in the first action are paid. All of those decisions, however, are based upon statutes which in some respects differ from ours and rest upon the assumption that the second action may not be commenced as a matter of right the same as the first one, but that a second action may be prosecuted only as a matter of grace and upon certain conditions that may be imposed by the court in which it is commenced. As I view the matter, the whole question depends upon the statute which is in force in the particular jurisdiction where the actions are commenced. While it is true that many of the states have statutes authorizing the bringing of a second action in case the first one fails otherwise than upon the merits, or in case the judgment in favor of the plaintiff is reversed by the appellate court, yet not all of the statutes in force in the several states are the same in import or effect. Our statute permitting a second action is found in Comp. Laws Utah 1917, section 6484, and reads as follows:

"If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action or upon a cause of action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die, and the cause of action survive, his representatives may commence a new action within one year after the reversal or failure."

That section in a more restricted form first appeared in Comp. Laws Utah 1876, page 369. From there it was carried forward into Comp. Laws Utah 1888 as section 3160. We next find it in Rev. Stats. Utah 1898 as section 2893 in the form it is set forth above. From thence it was carried into Comp. Laws Utah 1907, and from thence into the compilation of 1917, where it is found as section 6484, *supra*. Until 1898 the statute was limited to cases where a judgment in favor of the plaintiff had been reversed by the appellate court. In the Revised Statutes of 1898 it was, however, adopted in its present form, and has since then always been in force in this state. The section as now in force is, however, also supplemented by other sections which must be considered. Comp. Laws Utah 1917, section 6848, provides under what conditions actions may be dismissed and when a nonsuit may be granted. Section 6859, among other things, provides that a dismissal of the complaint "either before or after a trial does not prevent a new action for the same cause of action" unless it is expressly declared by the judgment roll that it was rendered upon the merits. If sections 6848, 6859, and 6484 are considered and construed together, as they must be, there is little, if any, room for doubt that under our statute, in case plaintiff's action fails otherwise than upon the merits, he has precisely the same right to commence a second action that he had to commence the first one; in other words, that there is no presumption against the plaintiff that the second action is vexatious any more than such a presumption existed that the first one was vexatious.

While it is true that an action may be vexatious, yet, in view of section 6859, which in express terms provides that a second action shall not be prevented, and of section 6484, which unconditionally authorizes a second action, I am utterly unable to perceive any basis for the presumption that the second action is any more vexatious than the first one. It might just as well be assumed that, in view that one may commence an action for vexatious purposes, therefore a presumption prevails that all actions are vexatious.

When a right to bring a second action is given uncondition-

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ally, as is the case here, in view of the provisions of the sections to which I have referred, there is—there can be—no basis for the presumption that the right is exercised vexatiously. If an action is in fact vexatious, that fact may be made to appear just as well when it is commenced the first time as it may be when it is commenced the second time. Under our statute the right to bring a second action is precisely the same as is the right to bring the first one, and it seems to me that, if the defendant has good reasons to 2 believe and does believe that the action is vexatious, he has the same right to oppose the first action upon that ground as he has to oppose the second one, and no better right. Courts are merely the instrumentalities of the sovereign state through which justice is administered in accordance with law, and no judge should permit his court to be used by any one as an instrumentality of oppression or vexation, upon the one hand, nor should he, by means of assumed presumptions, close the doors of the court against any one who under the law has a right to come into court. If, therefore, the suit is vexatious, it should be arrested at the very threshold of the proceeding; and, if it is not shown to be so, the right to proceed to trial should not be denied upon presumptions which are not based upon actual facts.

Moreover, if the action is vexatious, I cannot understand how the mere payment of cost purges it of that vice, nor do I see how the filing of an affidavit that the plaintiff is unable to pay the costs dissipates the presumption. If the action is vexatious, how can either the payment of costs or the inability to do so cure that vice? To so hold necessarily results in this, that a man with means may freely exercise his propensity to vex by the bringing of a second action in case he is willing to pay costs. Merely to pay costs, under the ruling of the district court, entirely dissipates the presumption of vexatiousness, and thereafter there is nothing which prevents the man with means from maintaining the action, although the desire to vex may be precisely the same as though he had not paid the costs. The court may thus be made an instrumentality to vex and harass upon the sole condition that the costs of the

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first action, which failed, are paid. It seems to me that merely to state the proposition should be sufficient to refute it.

In order to aid me in arriving at what I deem a just conclusion, I have carefully examined all of the statutes of the different states of the Union. In doing so I have discovered there is but one other state, namely, Montana, whose statute is precisely like ours respecting the bringing of a second action.. There are sixteen states which have statutes very similar to our section 6484, *supra*, namely: Arkansas (Kirby & Castle, Dig. Stats. Ark. section 6011); Colorado (2 Mills' Ann. Stats. Colo. page 2018, section 4643); Connecticut (2 Gen. Stats. Conn. section 6171); Illinois (Hurd's Rev. Stats. Ill. 1915, page 1674, section 25); Montana (2 Rev. Codes Mont. section 6464); North Carolina (Revisal of 1905 of N. C. section 370); Ohio (2 Bates' Ohio Ann. Stats. [3d Ed.] section 4991); Oklahoma (C. L. Okl. 1909, page 1222, section 5555); Rhode Island (Gen. Laws R. I. page 1002, section 9); Mississippi (Hemingway's Ann. Miss. Code, section 2488); Missouri (1 Rev. St. Mo. 1899, page 1030, section 4285); Kansas (Gen. Stat. Kan. 1909, section 5615); Maine (Rev. Stat. Me 1916, page 1217, section 94; *Id.* page 1380, section 11); Tennessee (Thompson's Shannon's Code of Tenn. section 4446); Vermont (Public Stats. Vt. section 1566). While the phraseology of the statutes differ somewhat, yet in substance and effect they are the same as our section 6484, *supra*. There is, however, no such statute as our section 6859, to which I have called attention, except in the state of Montana.

There are sixteen other states wherein the statutes upon the subject are more restricted than ours. In fact, the statutes of those states are practically the same as ours was before it was enlarged in 1898, as before stated. These states are: Alabama (Code of Ala. 1907, section 4845); California (Kerr's Cyc. Code of Cal. C. C. P. section 355); Idaho (Comp. Stats. Idaho, section 6626); Indiana (1 Burns' Ann. Stats. of Ind. 1901, section 300); Nevada (2 Rev. Laws Nev. 1912, section 4980); New Hampshire (Stat. of N. H. 1891, page 599, section 9); New Jersey (2 Gen. Stat. N. J. page 1978, sec-

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tion 26; North Dakota (Comp. Laws N. D. 1913, section 7388); Oregon (Gen. Laws Or. 1843-1872, page 109, section 21); Massachusetts (Public Stats. Mass, page 1114, section 12); Michigan (3 Comp. Laws Mich. section 12329); Minnesota (Gen. Stat. Minn. section 7713); South Dakota (Rev. Codes S. D. page 879, section 73); Virginia (2 Va. Code Ann., section 2934); West Virginia (Code W. Va. 1899, page 779, section 19); Wisconsin (Sanborn & Berryman's Ann. St. Wis. page 2180, section 4235); New York (1 Bliss, Ann. Code, section 405).

The following states have statutes which differ somewhat from those of all the other states I have hereinbefore named, namely: Georgia (Civ. Code of the State of Georgia 1910, section 4381); Iowa (Code of Iowa Ann. 1897, section 3455); Kentucky (Ky. Stats. 1894, section 2545); Maryland (2 Ann. Code Md. page 1667, section 70); New Mexico (N. M. Stats. Ann. 1915, section 3355); Delaware (Rev. Code Del. 1915, section 4681); Florida (Gen. Stats. of the State of Florida 1906, page 699, section 1715).

In the limited time at my command I have been unable to discover any statutes upon the subject in the remaining nine states.

I have referred to these statutes specifically for the reason that counsel in citing cases from the courts of the several states have cited them indiscriminately and seemingly without giving any attention to the provisions of the statutes upon the subject. Indeed, that also seems to be true of many of the decisions in which other cases are cited as authority. Moreover, it seems to be assumed as a matter of course in many of the decisions that the subject, at least to some extent, is regulated by the common law. Such is, however, not the case. Costs, especially in law cases, are purely statutory, and, unless the statute authorizes them, none can be recovered. *McCready v. Railroad*, 30 Utah, 1, 83 Pac. 331, 8 Ann. Cas. 732; *Davidson v. Munsey*, 29 Utah, 181, 80 Pac. 743.

It has also been held by this court (*Guthiel v. Gilmer*, 27 Utah, 496, 76 Pac. 628) that a plaintiff may commence a second action as a matter of right, if the first one fails otherwise

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than upon the merits. That is the only case in which both section 6484 and section 6859 are referred to and considered together. The logic and effect of that decision is that a second action may be prosecuted precisely the same as the first one and without the imposition of any conditions. As a matter of course, if it be made to appear that the first action is vexatious, it should be promptly dismissed, but the right to proceed should not be denied upon the mere presumption which is based upon nothing more substantial than that the first failed. Of what practical use is the right to commence a second action if it may not be prosecuted to judgment the same as the first one? The right to dismiss an action without prejudice and to commence another existed at common law. In view of that fact, why enact the present statute if nothing was intended to be accomplished by it? But it is insisted that section 6484 merely extends the time within which a second action may be commenced. That may be conceded, but the fact still remains that the second action may be unconditionally commenced. Again, it cannot be said that section 6859 merely extends the time for commencing a second action. That section, in express terms, provides that a second action shall not be prevented. That section was first adopted in 1898, when the present form of section 6484 was adopted. Why adopt section 6859 if nothing more was intended than to extend the time for bringing a second action? No other state, save Montana, has a statute like section 6859. Again, the statute in its present form had been in force fully twenty years when the decision which is assailed in this proceeding was rendered. It is common knowledge that during all of that time the right to commence a second action in case the first one failed otherwise than upon the merits was freely permitted by our courts and as freely exercised by the litigants. The right to commence a second action unconditionally had therefore been the settled practice of the district courts of this state for practically twenty years. While that, standing alone, may not be a conclusive reason why the practice should be continued as a matter of right, yet it presents a more or less persuasive reason why it should not be disturbed by the



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courts at this late date, and especially not when we keep in mind the maxim that "the practice of the court is the law of the court." To follow the course herein outlined, and which is the one indicated by our statute, no injury can result to any one. If the action is in fact vexatious, the defendant may freely allege and prove the fact, and that should end the matter. Upon the other hand, if it be assumed that the second action is vexatious merely because the first action failed otherwise than upon the merits, grave injustice may result. The first action may have failed, as the decisions of this court show, merely because the trial court erred in granting a nonsuit. The presumption is thus based upon a manifest error, and if the plaintiff cannot comply with the order of the court, he is deprived of the right of trying his case on the merits. But, even though it should be held that our statute does not give the right to prosecute the second action unconditionally, and that the weight of authority is to the effect that such a right does not exist, yet, in my judgment, the practice adopted by the district court should not be followed. The question here is not one involving property rights which have been based upon the decisions of the courts. It is merely a question of procedure. If, therefore, a course of procedure has been adopted which it is found does not promote justice and equity, it should be set aside, and a form of procedure substituted therefor which is promotive of justice and equality. A mere change of procedure, if otherwise just, cannot injure any one.

Without pursuing the subject further, and without reviewing the many authorities upon the subject, and without adding further reasons, which might easily be done, I am of the opinion that a peremptory writ should issue for the reason that the district courts of this state are as powerless to impose conditions to the right to prosecute a second action to judgment as they are powerless to impose conditions to prosecute the first one, provided the firstone falls otherwise than upon the merits. In case the defendant makes a showing that the action is in fact vexatious, that question should be tried as other questions of fact are tried; and, if it be found that the

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action is vexatious, the judge should promptly dismiss it and refuse to permit his court to be used as an instrumentality to vex and harass the defendant. That course should, however, be followed whether it is the first or second or any other action.

By what I have said I do not wish to be understood that under no circumstances can a presumption arise that an action is vexatious. Neither do I contend that in case a plaintiff brings a second action after having dismissed the first one, or after having failed therein otherwise than upon the merits, the defendant may not make it appear that by reason of his poverty, or for any other valid reason, he is unable to present his defense to the second action and ask that the court make such orders respecting the payment of costs in the first action and respecting the trial of the second case as may be fair and just to both parties. All I insist upon is that the court has no right to impose conditions upon the plaintiff to proceed with his second action on the mere presumption that it is vexatious, and hence unfair to the defendant.

THURMAN, J.

The statutes of Utah recognize the right of a plaintiff to commence a new action for the same cause when the first action is dismissed upon grounds other than the merits. The right, as far as the statutes are concerned, is unconditional. It implies the right to prosecute the case to a final judgment. Granting the contention of defendant that, notwithstanding the statutes, the courts have the power to maintain orderly procedure, protect the rights of litigants, and prevent the abuse of its process on the part of those whose purpose is to vex and annoy, the question nevertheless arises: Should the court in any case when a new action is commenced assume to impose insurmountable conditions upon the right to prosecute the case, without some showing of bad faith, hardship, or oppression? In answer to this question we are met with the proposition that the law presumes the second suit is vexatious, and that the burden is upon plaintiff to show that it is not.

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The logic of this contention, to say the least, is far from convincing.

It is conceded in this case that the first action was dismissed on grounds other than the merits. Therefore the merits of the action were not involved. They stand unchallenged, unaffected, and the good faith of the plaintiff in bringing the action is in no manner impeached. To insist otherwise would be to contend that the merits of the action were involved in the dismissal, and that the judgment of dismissal impeaches their integrity. This contention, if made, would be contradictory, if not paradoxical. We cannot in one breath assume that the action was dismissed on grounds other than the merits, and in the next breath contend that the merits were affected by the dismissal. Looking at the question from every point of view, we are inevitably led to the conclusion that, when the second action is commenced, the plaintiff, as far as his real grounds of action are concerned, is exactly in the same condition as he was at first. The merits of his action are just the same. He has neither gained nor lost by the dismissal, except that defendant has obtained a judgment against him for costs. A judgment for what is due is ordinarily all that any litigant ever obtains in a court of justice, no matter how righteous his cause may be.

If the plaintiff is in the same position when his second action is commenced as he was at first, if the integrity of his cause and the merits of his action were unimpeached by the dismissal, whence comes the presumption that the second suit is vexatious? I am forced to the conclusion that, whatever may have been the reasons at common law or under the statutes of other states for the presumption relied on, it was the manifest intention of our Legislature, by the statutes referred to, to confer upon plaintiff the right to prosecute a second action under exactly the same conditions and limitations that he could prosecute the first, that he may proceed without any presumptions against him as far as the dismissal of the first action is concerned, and that the question as to whether a suit is vexatious, whether it be the second or the first, is a question of fact to be established by the party who alleges its existence,

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unless it is manifest on the face of the proceeding.

I concur in the conclusions reached by my Associates that the writ should issue as prayed for in the complaint.

WEBER, J.

While I concur in the conclusions reached by the Chief Justice, I base my concurrence largely upon the reasons given by Mr. Justice FRICK. In my opinion, courts in this state may not legally adopt and enforce a rule to the effect that the plaintiff in a second suit for the same cause of action should not be allowed to proceed until payment by him of costs of the former action, when plaintiff failed in the first suit otherwise than on the merits. The enforcement of such a rule would be a nullification of the statute. Nonpayment of a judgment for costs in the first action does not, under our statute, raise a presumption that the second suit is vexatious. It certainly cannot be deemed vexatious for one to do that which the statute gives him the right to do. The right given by the statute is unconditional, and when a plaintiff fails in a suit otherwise than on the merits, he has the absolute legal right to commence the suit a second time and to proceed as if he had never been in court, whether he pays the costs of the first suit or not. He is not required to purge the second suit of an assumed vice of vexation by paying costs that may have been adjudged against him in the first action.

GIDEON, J.

I concur in the order making the alternative writ permanent. I agree with the conclusion that under the statutes of this state a litigant has the right to institute a second action upon the same facts in case the former action has been determined otherwise than upon the merits. Such second action is not subject to be delayed or defeated by any presumption that it is vexatious.

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Prayer for Mandamus. Writ Issued.

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INDUSTRIAL COMMISSION OF UTAH et al. v. MURRAY  
CITY et al.

No. 3407. Decided March 2, 1920. (188 Pac. 274.)

1. **MANDAMUS—DENIAL OF JURY IN ACTION TO SET ASIDE AWARD NO DEFENSE AGAINST MANDAMUS TO ENFORCE AWARD SET ASIDE BY JUDGE, BUT REINSTATED ON APPEAL.** In mandamus to enforce an award of the Industrial Commission against a city, the city cannot complain that in its action to set aside the award it was denied a jury trial, where the trial court granted the relief prayed for, but it was reversed on appeal. (Page 526.)
2. **EVIDENCE—KNOWLEDGE BY PARTY TO PRIOR ACTION OF EFFECT OF JUDGMENT PRESUMED.** In mandamus to enforce an award of the Industrial Commission against a city, the city, which was represented by counsel at all stages of the proceedings, is conclusively presumed, to know which of two cases in the district court, respecting the award was appealed, and that the judgment on appeal was final and conclusive. (Page 526.)
3. **MANDAMUS—ORDER FOR PAYMENT OF MONEY BY CITY SUSPENDED BECAUSE OF INABILITY TO PAY UNTIL FOLLOWING YEAR.** Where a city has no money with which to pay an award of the Industrial Commission, and its resources for the current year had been exhausted, a writ of mandamus will be held in suspense until the expiration of that year. (Page 526.)

Application for mandamus by the Industrial Commission of Utah and another against Murray City and others.

PEREMPTORY WRIT ISSUED.

See, also, 183 Pac. 331.

*Dan B. Shields, Atty. Gen., James H. Wolfe, O. C. Dalby, and H. Van Dam, Jr., Asst. Atty. Gen., for plaintiffs.*

*D. W. Moffat, of Murray, for defendants.*

THURMAN, J.

The Industrial Commission of Utah, hereinafter called "the commission" and David Hazeldine, as plaintiffs, brought this

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action against Murray City and its officers for a writ of mandate, requiring said defendants to pay, or provide for the payment of, a certain award to said Hazeldine theretofore made by said commission.

The record discloses the facts to be that the award was made against the defendant city and a copy thereof duly served, but that said city neglected and refused to pay the same; that said city thereafter commenced an action against the commission in the district court of Salt Lake county to set aside said award on the ground that the commission was without jurisdiction to make the same; that a hearing was had thereon in said district court, and judgment entered therein, setting aside said award; that in due course the commission thereafter appealed from said judgment to this court, wherein the judgment of the district court was reversed; that the district court thereafter entered its judgment, affirming the award, and that the defendant city still neglects and refuses to pay the same.

As we read the record, there is no substantial controversy as to the facts above set forth. It is true the defendants allege that on or before the hearing in the district court the city demanded a jury, but as it appears that a hearing on the facts was had before the court, and that the court rendered judgment in favor of the city, the city has no grounds for complaint, even if its demand for a jury was refused. Defendant further states that about the time the city commenced its action in the district court against the commission, the commission applied in the same court for a writ of mandate, requiring the city to pay the award. Defendants express their inability to determine whether the appeal to this court was from the judgment rendered by the district court, above referred to, in favor of the city, or in the proceeding by the commission for a writ of mandate. Finally, defendants allege on information and belief that the action instituted by the city in the district court is still pending therein and undetermined. Inasmuch as the defendant city was, in all the cases referred to, at all times, actively represented by the attorney who prepared and filed the answer in

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Appeal from Seventh District.

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the present case, and by no other attorney, defendant must be conclusively presumed to know that its case against the commission in which it obtained a judgment was the case which was appealed to this court, and that the judgment rendered therein was final and conclusive. 183 Pac. 331.

We have no means of determining the state of mind, purpose, or intent which induced the matter set up in the answer to which we have referred. It is exceedingly fortunate that such lapses of memory on the part of litigants seldom occur.

Defendants in this case made the further answer that the defendant city had no money or funds with which to pay said award, and was unable to raise said funds 3 during 1919, as its resources for that year were exhausted. We were disposed to consider that as a good defense temporarily, and for that reason the judgment of this court was held in suspense until the year expired. The defense is not available now.

It is therefore ordered that a peremptory writ issue as prayed for in the complaint. Defendant city to pay the costs.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

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STATE v. HOWD.

No. 3402. Decided March 6, 1920. (188 Pac. 628.)

1. FALSE PRETENSES—EVIDENCE INSUFFICIENT TO ESTABLISH CRIME. In a prosecution for having obtained certain cattle by fraudulent and false pretenses, checks given therefor having been dishonored, evidence held insufficient to establish a violation of Comp. Laws 1917, section 8344, not showing any intent to cheat or defraud, nor any actual fraud, nor a fraudulent representation or false pretense to perpetrate the fraud, nor that the alleged fraudulent representation or pretense induced the owner to part with the cattle. (Page 533.)
2. FALSE PRETENSES—PROMISE TO PAY WITHOUT INTENTION OF PERFORMING NOT A "FALSE PRETENSE"—"FRAUDULENT REPRESENTATION." The representation by the buyer of cattle that he would

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pay therefor on their arrival, though made without intention to pay, was not a "fraudulent representation" or "false pretense" in the legal acceptance of the terms. (Page 533.)

3. FALSE PRETENSES—OCCURRENCES AFTER OWNER PARTED WITH POSSESSION DO NOT SUSTAIN CHARGE. What may have taken place between defendant and the owner of cattle after such owner had parted with them, by reason of which happenings the owner sustained pecuniary loss, could not support charge against defendant of having obtained the cattle by false pretenses. (Page 534.)
4. FALSE PRETENSES—CONVICTION UNSUSTAINED BY UNCORROBORATED VERBAL TESTIMONY OF COMPLAINANT. Under Comp. Laws 1917, section 8991, in a prosecution for having obtained cattle of another by false pretenses, the uncorroborated verbal testimony of the complaining witness was insufficient to sustain conviction. (Page 534.)

Appeal from District Court of Grand County, Seventh District; *Geo. Christensen*, Judge.

James C. Howd was convicted of obtaining property by false pretenses, and he appeals.

JUDGMENT REVERSED, and defendant discharged.

*W. F. Knox*, of Beaver City, for appellant.

*Dan B. Shields*, Atty. Gen., *James A. Wolfe*, *O. C. Dalby*, and *H. Van Dam, Jr.*, Asst. Attys. Gen., for the State.

CORFMAN, C. J.

The defendant was tried and convicted before the district court for Grand county of having obtained certain personal property by fraudulent and false pretenses. He appeals.

The defendant sets forth and complains on appeal of many alleged errors as grounds for reversal, among them that defendant did not have a preliminary examination, nor was it waived, before the committing magistrate as to the charge made against him in the information upon which he was tried and convicted in the district court.



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Appeal from Seventh District.

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For the purposes of this opinion we do not, however, deem it necessary to discuss or pass upon the regularity or legality of the proceedings leading up to the filing of the information, but will assume that such proceedings were regular and in accordance with law. The more important questions raised by the defendant are as to whether or not the judgment upon conviction can be sustained under the information filed, in view of the evidence adduced on the part of the state to prove the offense of which the defendant stands convicted.

The information as originally filed and afterwards amended contained two counts: One charging the defendant with grand larceny; the second charging him with "knowingly and designedly obtaining chattels by false representations and pretenses, committed as follows:

"That the said James C. Howd, on the 5th day of December, at Grand county, state of Utah, did then and there with intent to cheat and defraud Thomas B. Foy of his personal property, to wit, thirty head of cattle, knowingly, designedly, falsely, feloniously, and fraudulently represent and pretend to the said Thomas B. Foy, that he, the said James C. Howd, was then and there the duly authorized agent of Consley and Adams (amended to read Adams and Consley), of Grand Junction, Colo., the said Adams and Consley then being a reputable firm of live stock buyers, with headquarters in Grand Junction, Colo., and falsely represented and pretended that he the said James C. Howd was authorized to contract for the sale of said cattle for and on behalf of said Adams and Consley, and then and there falsely represented and pretended that the said Adams and Consley would pay the purchase price of said cattle upon delivery of said cattle and weight of the same at Grand Junction, Colo. By means of said false and fraudulent representations and pretenses, and the said Thomas B. Foy relying upon and believing said statements and said representations to be true, he, the said James C. Howd, did then and there knowingly and designedly obtain from the said Thomas B. Foy the possession of said thirty head of cattle aforesaid, with the intent then and there to cheat and defraud the said Thomas B. Foy of the same, contrary to the form of the statute," etc

At the trial, upon application being made by the defendant to the court for an order requiring an election, the state at the conclusion of the testimony elected to and did rely upon the second count alone in the information.

There is no material conflict in the testimony. It shows  
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that some time prior to December 5, 1918, the defendant had engaged under contract to furnish Adams and Consley of Grand Junction, Colo., certain cattle. The defendant was unable to furnish the specific cattle called for under the said contract. About this time the defendant met the complaining witness, Thomas B. Foy, who was engaged in raising live stock at Thompsons, Utah. Foy did not have the kind of cattle called for in the contract defendant had entered into with Adams and Consley. However, the defendant at the time communicated with Adams and Consley, and it was agreed that Adams and Consley would take the kind of cattle that could be provided by the complaining witness Foy. Negotiations were then entered into between the defendant and Foy for the purchase of cows, the kind of animals that could be provided by Foy and other owners of cattle in the vicinity of Thompsons. A shipment of about ninety head of cattle was then made up at Thompsons, including thirty head of cows owned by Foy, and consigned to Adams and Consley at Grand Junction, Colo. The cattle were shipped in the name of defendant as consignor. The defendant, before shipment, paid to the witness Foy \$200 to apply on the purchase price, the balance to be paid at Grand Junction upon the arrival of the cattle there and the weighing out and delivering to the consignee, Adams and Consley. The defendant and Foy together loaded the cattle on board cars at Thompsons, and both accompanied the shipment to Grand Junction, where it arrived on a Saturday night, but was not unloaded into the yards of Adams and Consley until the Sunday morning following. Up to the time of the delivery of the cattle to Adams and Consley there is no evidence tending to show any fraud or deception on the part of the defendant practiced upon Foy. It is true Foy testified that he "understood" the cattle were being purchased by Adams and Consley. However, Foy's testimony further shows, and there is no other testimony in the record bearing on the question, that the only representation made to him by the defendant was that he was buying cattle for the sugar factory (Adams and Consley). Regard-

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ing this phase of the transaction at Thompsons, Utah, the testimony of Foy was as follows:

"Q. In what capacity was he acting for Adams and Consley?

"The Court: He may state what he [defendant] said. A. Well he had to furnish so many cattle a week for the sugar factory.

Q. Did he say in what capacity he was buying, as manager or overseer? A. No, sir. Q. Did you understand or did you state that Adams and Consley were the buyers at the sugar factory?

A. Yes, sir. Q. Had you heard of them previous to this time?

A. Yes, sir. Q. And you knew of them being in the cow business?

A. Yes, sir."

The testimony further shows that after the delivery of the cattle at Grand Junction the witness Foy asked for and received at the hands of Adams and Consley an allowance of fifteen pounds per head for shrinkage while the animals were in transit from Thompsons to Grand Junction, but the witness testifies he made the bills of sale only for the purpose of meeting the request of Adams and Consley. After the cattle had been weighed and delivered to Adams and Consley at Grand Junction the purchase price of the several lots, according to former ownership, was, at the request of Foy, ascertained by Adams and Consley, and by them a check for the entire shipment was made direct to the defendant. Thereupon the defendant made his personal checks for the purchase price of the several lots, including a check for the thirty head of cows that had been owned by Foy. Foy then returned home with the checks given him by defendant, and later, when the checks were presented at the Grand Junction bank upon which they had been drawn, payment was refused on account of insufficient funds. The testimony shows that at the time these checks were made out and delivered by defendant to Foy the defendant explained to him that he would not have sufficient funds in the bank until he deposited the check that had been given him for the cattle by Adams and Consley. While it is true the record shows that Foy executed a bill of sale for the cattle to Adams and Consley at the request of the latter, the witness Foy, when questioned as to whom he expected to get his pay for the cattle from, testified that he thought at the time he was going to get it from the defendant,

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and that he supposed that defendant and Adams and Consley had "settled up."

It is also shown by the testimony that subsequent to the transaction criminally complained of against defendant the complaining witness, Foy, instituted attachment proceedings in a civil action against the defendant, in which it was expressly stated, both by affidavit and allegation in the complaint, as grounds for a recovery, that the defendant was indebted to him "upon an express contract for certain cattle sold to defendant."

At the conclusion of the testimony for the state the defendant moved the court for a dismissal upon various grounds, among them "that the facts show that the defendant committed no offense whatever in getting the thirty head of cattle from the complaining witness, Mr. Foy," and again, before the submission of the case to the jury for a directed verdict that the defendant was not guilty of the offense attempted to be charged in the information, upon the ground of the insufficiency of the testimony. The trial court's denial of these motions is relied upon and assigned as error by defendant for a reversal of the judgment entered against him.

There is much testimony in the record tending to show the disreputable character of the defendant. He was, according to his own testimony, acting under an assumed name while dealing with Mr. Foy; that after he received payment for the shipment of cattle he indulged himself in drink, and while drinking lost the money he had received for the cattle at the gambling table, and then departed for Canada without providing funds at the bank to meet payment of the checks he had given to Mr. Foy. However, as we read the testimony in this case, it is insufficient in many particulars to establish the crime sought to be charged in the information and of which defendant was convicted in the district court—that of "obtaining from another, by false and fraudulent representations and pretenses, goods, chattels, and things with intent to cheat and defraud such other person," to wit, thirty head of cattle, the property of Thomas B. Foy.

Under our statute (Comp. Laws Utah 1917) section 8344, it is provided:

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"Every person who knowingly and designedly, by false or fraudulent representations or pretenses, shall obtain from any other person any chose in action, money, goods, wares, chattels, effects, or other valuable thing, with intent to cheat or defraud any person of the same, if the value of the property so obtained does not exceed fifty dollars, is punishable as in cases of petit larceny, and when the property so obtained is of the value of more than fifty dollars, the person so offending shall be punishable as in cases of grand larceny."

It will be seen that under our statute, in order to constitute the offense of which the defendant stands convicted, certain elements or things must concur, viz.: (1) 1 There must be an intent to cheat or defraud; (2) an actual fraud must be committed; (3) there must be a fraudulent representation or a false pretense for the purpose of perpetrating the fraud in obtaining the property of another; (4) the fraudulent representation or false pretense must be the cause which induced the owner to part with his property.

In our opinion, proof of any one of the foregoing essential elements is wholly lacking in the case at bar. The testimony is absolutely clear that no actual fraud was intended or perpetrated in this state. All that can be gathered from the record of the testimony is to the effect that defendant purchased Foy's cattle at Thompsons, Utah, that he there paid to Foy a part of the purchase price, and promised to pay the balance upon the arrival of the cattle at Grand Junction, Colo., a promise to be performed in the future. This was a very ordinary and perfectly legitimate transaction, and one that would not legally justify any inference of an intention to cheat or defraud Mr. Foy out of his property. Let it be conceded, although it is not shown from the testimony, that the defendant did not intend to pay for the cat- 2 tle upon their arrival at Grand Junction, yet his representation that he would pay was purely promissory in character, and therefore may not be held as a fraudulent representation or false pretense in the legal meaning or acceptance of the terms. *Colly v. State*, 55 Ala. 85; *State v. Haines*, 23 S. C. 170-173; *State v. Mills*, 17 Me. 211-217; *Commonwealth v. Moore*, 99 Pa. 570; *Brown v. State*, 166 Ind. 85, 76

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N. E. 881, 8 Ann. Cas. 1068; 11 R. C. L. page 831, section 9.

Neither as a matter of law nor as a question of fact do we think it can be held that the defendant was legally or justly held for the crime of which he stands convicted in this state. The gravamen of the offense charged against him was the making of fraudulent representations and pretenses, and thereby obtaining Foy's cattle. The record discloses no fraudulent representations nor pretenses whatever in the transactions that took place between the parties whereby the defendant induced Foy to part with his property. What may have subsequently transpired between the parties, by reason of which Foy sustained pecuniary loss, is not sufficient to support the charge made against the defendant in the information. Then again, regardless of the sufficiency of the testimony in the particulars we have heretofore mentioned and pointed out, we take the view that the testimony must be held insufficient in this case, for the reason that it conclusively appears from the record that the conviction was had by reason of uncorroborated verbal testimony of the complaining witness, Thomas B. Foy, alone. In this class of cases it is, by our statute (C. L. Utah 1917, section 8891), expressly provided:

"Upon a trial for having with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any money, personal property, or valuable thing, the defendant shall not be convicted if the false pretenses shall have been expressed in language, unaccompanied by a false token or writing, unless the pretense or some note or memorandum thereof be in writing, subscribed by or in the handwriting of the defendant, or unless the pretense be proved by the testimony of two witnesses, or that of one witness and corroborating circumstances; but this section shall not apply to a prosecution for falsely representing or personating another, and in such assumed character, marrying, or receiving any money or property."

We are therefore of the opinion that the motion for the defendant's discharge at the conclusion of the state's testimony, and the motion for a directed verdict in his favor upon submission of the case to the jury, should have been granted by the district court.

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It is therefore ordered that the judgment be reversed, and that the defendant be discharged.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

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WILCOX v. JAMISON et al.

No. 3403. Decided March 6, 1920. (188 Pac. 638.)

1. **LANDLORD AND TENANT—EVIDENCE OF ORIGIN OF FIRE COMPETENT IN ACTION BY TENANT AGAINST LANDLORD FOR INJURIES IN BURNING BUILDING.** In a tenant's action against his landlord for personal injuries due to a fire alleged to have occurred through the landlord's negligence, evidence respecting the condition of the building after the fire *held* competent on the issue as to the location of the fire and as tending to locate the place where the fire originated; one of the grounds of negligence being that the fire was caused by the close proximity of a furnace pipe to a wooden floor. (Page 537.)
2. **LANDLORD AND TENANT—KNOWLEDGE OF LANDLORD OF ORDINANCE REQUIRING FIRE ESCAPES HELD IMMATERIAL IN TENANT'S ACTION FOR INJURIES.** In a tenant's action against a landlord for personal injuries due to a fire alleged to have occurred because of defendant's negligence in maintaining a furnace pipe in close proximity to a wooden floor, it was not error to exclude evidence by defendants that they had no knowledge of the existence of an ordinance requiring the building to be equipped with fire escapes and that they had not been notified that they were required to construct fire escapes; the personal knowledge of defendants as to the existence of the ordinance being immaterial. (Page 538.)
3. **LANDLORD AND TENANT—LANDLORD LIABLE FOR FAILURE TO OBEY ORDINANCE REQUIRING FIRE ESCAPE.** In tenant's action against a landlord for personal injuries due to a fire in the building, an instruction that, if the landlord violated the ordinance requiring buildings to be equipped with fire escapes and that such violation by itself or in connection with other acts of negligence on his part was the proximate cause of the injuries, then in case the jury found that such injury was not contributed to by plaintiff's negligence plaintiff was entitled to recover, was correct. (Page 539.)
4. **LANDLORD AND TENANT—TENANT HELD NOT NEGLIGENT IN CHOOSING BETWEEN HAZARDOUS WAYS OF ESCAPE FROM BURNING BUILD-**

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ING. In a tenant's action for personal injuries due to a fire caused by the close proximity of a furnace pipe to a wooden floor, that the tenant upon discovering the fire and finding the main hallway full of smoke endeavored to escape by the back stairs, but being unable to gain access to them returned to her apartment, where she was overcome by heat, did not constitute contributory negligence, since one compelled instantly to choose between two hazards is not negligent if he makes a choice a person of ordinary prudence would have made, although injury results therefrom. (Page 540.)

5. LANDLORD AND TENANT—CONTRIBUTORY NEGLIGENCE OF TENANT ESCAPING FROM BURNING BUILDING HELD QUESTION OF FACT. In a tenant's action against a landlord for personal injuries sustained in a fire alleged to have been caused by the landlord's negligence in maintaining a furnace pipe in close proximity to a wooden floor, evidence held to make the question of plaintiff's contributory negligence in endeavoring to escape one for the jury.<sup>1</sup> (Page 540.)

Appeal from District Court, Third District, Salt Lake County; *John F. Tobin*, Judge.

Action by Ruth Wilcox against Margaret Jamison and another.

Judgment for plaintiff, and defendants appeal.

**AFFIRMED.**

*Ray Van Cott*, of Salt Lake City, for appellants.

*Willey & Willey*, of Salt Lake City, for respondent.

GIDEON, J.

In January, 1918, the defendants owned an apartment house in Salt Lake City, Utah. The plaintiff, her husband, and one child were then tenants of defendants, occupying an apartment on the fourth floor of said building. The building

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<sup>1</sup> *Newton v. O. S. L. R. Co.*, 43 Utah, 219, 134 Pac. 567; *Davis v. R. R. Co.*, 45 Utah, 1, 142 Pac. 705.



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was heated by a furnace in the basement. The defendants furnished the fuel to heat the building, and the furnace was under the control of their employé. An iron pipe ten or twelve inches in diameter and about fifteen feet long ran from the furnace to the brick flue or chimney. The chimney carried the smoke from the basement out through the top of the building. On January 6, 1918, fire broke out in the basement, and the plaintiff was severely burned. Plaintiff alleges: (1) Negligence in maintaining the pipe in close proximity to the wooden floor of the building; (2) negligently overheating the pipe on the day of the fire; and (3) negligently failing to provide any fire escape. Defendants denied the negligence, and as an affirmative defense alleged that the injury was the direct and proximate result of plaintiff's own negligence and carelessness. The jury returned a verdict for plaintiff. Defendants appeal. Error is assigned in the admission and exclusion of evidence; also, in giving certain instructions.

A witness for the plaintiff was permitted to testify respecting the condition of the building after the fire—that is, to detail the part burned or damaged by the fire—and also the condition of one or two other apartments located on the first floor. The origin or location of the fire was a question in issue, and this testimony was admitted, and was competent, as tending to locate the place where the fire originated. It was the contention of the plaintiff and one of the alleged grounds of negligence that the fire was caused by the pipe being maintained in such close proximity to the wooden floor immediately above the pipe that this floor became ignited and the fire resulted. The testimony of the janitor, an employé of the defendants, was that the pipe was within twelve or fourteen inches of the floor; that prior to the date of the fire he had spoken to one of the defendants about the size of 1 the furnace and the location of the pipe, and in that conversation had advised such defendant that the furnace was too small to heat the building, and as a result he was required, in extremely cold weather, to so feed the furnace that the pipe would frequently become "red hot." It appears from other evidence that the location of the pipe and the limited space

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between the pipe and the floor was known to the defendants. The testimony objected to was competent to establish the contention of the plaintiff that the cause of the fire was the close proximity of the pipe to the wooden floor, and that the defendants had knowledge of the conditions.

The court refused to permit the defendants to testify that they, or either of them, had no knowledge of the existence of the ordinance requiring buildings such as the one in question to be equipped with fire escapes, and to the further fact that they had never been notified by any officer of Salt Lake City that they were required to construct fire escapes upon the building. It is admitted that the ordinance was in effect at that time and had been for some time previous. 2

Under the authorities, it is wholly immaterial whether the defendants had any personal knowledge of the existence of the ordinance or not. *Rose v. King*, 49 Ohio St. 213, 30 N. E. 267, 15 L. R. A. 160; *Arnold v. National Starch Co.*, 194 N. Y. 42, 86 N. E. 815, 21 L. R. A. (N. S.) 178.

There was no error committed in either the admission or in the exclusion of testimony.

The ordinance was introduced in evidence. In fact, it was set out in the plaintiff's complaint. Among other things, it provides that—

"Every building of three or more stories in height, and every building used or occupied as a theater, hospital, tenement house, apartment house—above the second story—shall be provided and equipped with metallic fire escapes combined with suitable balconies \* \* \* firmly secured to the outer walls."

The ordinance also provides that such buildings "that are already erected and built, or that may be hereafter erected and built in this city, shall be provided and equipped with fire escapes."

It is admitted that the defendants had not constructed or maintained on the building, or equipped it with, any fire escapes at the date of the accident. It also appears that there was no other means of ingress to or egress from plaintiff's particular apartment save through the front hallway. On the morning of the accident, the fire had rendered it impossible for any one on the fourth floor to leave the building

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through that hallway. In the rear of the building there were stairways leading to the ground, but there was no direct connection between the apartment occupied by the plaintiff and those stairways. On the contrary, it affirmatively appears that the only way of obtaining egress by means of those stairways was through an apartment located in the rear of the one occupied by plaintiff. The plaintiff attempted to make her escape in that way, but, by reason of her failure to gain admission into the rear apartment, could not do so.

There is testimony in the record to support plaintiff's contentions on each ground of negligence alleged.

The court instructed the jury that if they found that the defendants violated the ordinance in question by failing to provide fire escapes and that such violation, by 3 itself or in connection with other acts of negligence on the part of the defendants, was the proximate cause of the injury complained of by the plaintiff, then, in case the jury found that such injury was not contributed to by her own negligence, she was entitled to recover. The principle announced in that instruction is supported by the highest authority. *Hayes v. Michigan Cent. R. R. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; *Briggs v. New York Cent. & H. R. R. Co.*, 72 N. Y. 26; *Rose v. King*, supra.

It appears that the plaintiff, on awakening in the morning and on ascertaining that the building was on fire, opened the door of her apartment leading into the main hallway and found the hallway full of smoke. Thereupon she rushed to the rear end of the building in an effort to escape by way of the back stairs. Being unable to gain access to those stairs, she came back, turned into her own apartment, and just as she was entering, became overcome by the heat and as a result suffered the injuries complained of. The defendants contend that by reason of these acts on the part of plaintiff it was affirmatively shown that her own negligence contributed to and was the immediate cause of the injury. The court, in its fifth instruction, told the jury that where one is placed by the negligent act of another in such position that he is compelled to choose upon the instant and in the face of great

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and impending peril between two hazards, and he makes such a choice as a person of ordinary prudence placed in the same situation would probably have made, and injury 4 results therefrom, the fact that if he had chosen the other hazard he would have escaped the injury does not show negligence. It is in the record that the plaintiff knew that there were no fire escapes, and knew there were no other means of escape from the apartment to the ground except by the front and rear stairways. The instruction as given correctly defines the duty or degree of care required of any one who unexpectedly finds himself in a dangerous situation caused by the negligence of another and is compelled to instantly, and without reflection, decide upon a course of action. The principle or rule of law is stated in 29 Cyc. 521, as follows:

"The rule is well established that, when one is required to act suddenly and in the face of imminent danger, he is not required to exercise the same degree of care as if he had time for deliberation and the full exercise of his judgment and reasoning faculties. And this is especially true where the peril has been caused by the fault of another. He will not be held guilty of contributory negligence merely because he failed to exercise the care a prudent person would have exercised, or because he fails to exercise the best judgment, or takes every precaution which he might have taken which from a careful review of the circumstances it appears he might have taken. But if he in good faith acts as a person of ordinary prudence might under the circumstances, he will not be guilty of contributory negligence even by doing an act which is dangerous and from which injury results in attempting to escape danger."

See, also, *Penn. R. R. Co. v. Werner*, 89 Pa. 59; *Vallo v. U. S. Express Co.*, 147 Pa. 404, 23 Atl. 594, 14 L. R. A. 743, 30 Am. St. Rep. 741; 20 R. C. L. 29.

The court submitted the question of the plaintiff's contributory negligence to the jury under proper instructions, and the jury resolved that issue against the contention 5 of the defendants. Under the facts in this case, reasonable minds might well differ respecting plaintiff's contributory negligence, and whether such negligence, if she was negligent, was or was not excusable, or was the proximate cause of the injury. It was therefore a question for the jury. The

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court rightfully submitted the issue to the jury for determination. *Newton v. O. S. L. R. Co.*, 43 Utah, 219, 134 Pac. 567; *Davis v. R. R. Co.*, 45 Utah, 1, 142 Pac. 705; *Palmer v. Dearing*, 93 N. Y. 7.

Other errors are assigned and discussed in the brief of appellants. The matters complained of were in no way prejudicial. There being no reversible error in the record, the judgment is affirmed. Appellants to pay costs.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

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SINGH v. MACDONALD.

No. 3416. Decided March 6, 1920. (188 Pac. 631.)

1. MALICIOUS PROSECUTION—ALLEGATION THAT DEFENDANT DID NOT USE "DUE CARE" TO ASCERTAIN FACTS HELD INSUFFICIENT. In an action for malicious prosecution, an allegation that defendant did not use due care to ascertain whether or not a check was forged, or genuine, was not equivalent to an allegation that the prosecution was instituted without probable cause and was insufficient to state a cause of action.<sup>1</sup> (Page 543.)
2. JUDGMENT—MUST BE BASED ON COMPLAINT STATING CAUSE OF ACTION. In the absence of allegations essential and necessary to the statement of a cause of action, a judgment cannot be upheld. (Page 543.)

Appeal from District Court, Third District, Salt Lake County; *Wm. H. Bramel*, Judge.

Action by George E. Singh against N. A. Macdonald.

From a judgment for plaintiff, defendant appeals.

REVERSED and REMANDED, with directions.

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<sup>1</sup> *Kennedy v. Burbidge*, 54 Utah, 497, 183 Pac. 325.

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Singh v. MacDonald, 55 Utah 541.

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*W. E. Davis*, of Brigham, for appellant.

*J. H. Rozzelle*, of Salt Lake City, for respondent.

GIDEON, J.

In this action plaintiff seeks a money judgment against the defendant for alleged malicious prosecution. A trial was had and a verdict rendered by the jury in favor of plaintiff. Motion for a new trial was overruled, and the defendant appeals.

The defendant demurred to the original complaint on the ground that said complaint did not state a cause of action. The demurrer was overruled. At the close of the testimony in the case the plaintiff was permitted, over the objections of the defendant, to file an amended complaint. The sufficiency of the amended complaint is challenged by the assignments of error. The complaint, after alleging the fact of plaintiff's arrest on the verified complaint of the defendant charging forgery, his trial, and acquittal, further states:

"The plaintiff alleges that the arrest of the plaintiff herein was unlawful, willful, and malicious, and was done for the purpose of injuring the plaintiff in the following particulars: That the defendant herein did not use due care in ascertaining or attempting to ascertain whether or not the check herein referred to was forged or genuine."

The indispensable elements or matters necessary to entitle one to recover in an action for malicious prosecution are stated in a recent decision of this court. *Kennedy v. Burbidge*, 54 Utah, 497, 183 Pac. 325. In that case, in an opinion prepared by Mr. Justice THURMAN, it is said:

"In an action for malicious prosecution at least three distinct matters are necessary to be alleged and proved: (1) That the proceeding complained of as ground for the action was without probable cause; (2) that the proceeding was malicious; and (3) that the proceeding was finally terminated in favor of the plaintiff."

In volume 5, Words & Phrases, page 4309, it is said:

"To maintain an action for malicious prosecution it must appear that there was no probable cause for the prosecution, and also that the defendant was actuated by malice in instituting the prosecution.

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There must be both want of probable cause and malice." (Citing numerous cases.)

The same principle is stated in 26 Cyc. at page 20. See, also, *Rieger & Co. v. Knight*, 128 Md. 189, 97 Atl. 358, L. R. A. 1916E, 1277.

The respondent, does not, as I understand his position, deny the rule of law stated in the foregoing excerpts, but insists that he has met such requirements by the allegations that the defendant herein did not use due care to ascertain the facts. It is apparent, on a moment's reflection, that "failure to use due care" is not synonymous with "without probable cause." The defendant may have exercised the greatest care in ascertaining all of the facts surrounding the alleged offense, and at the same time the facts so found would have convinced any prudent person that there was an absence of probable cause that the plaintiff was guilty of the offense. On the other hand, the elements of probable cause might exist without the exercise of any or but little care on the part of the accuser in the criminal prosecution. If it is found that probable cause did, in fact, exist, it would be a complete answer and defense in this as well as in all actions of malicious prosecution regardless of whether due care or any care had been taken by the defendant in causing the arrest and prosecution of the plaintiff in such action. 1

We are unable to agree with the respondent that the allegations of the complaint, tested by the above requirements, state a cause of action. In the absence of the essential and necessary allegations in the complaint to state a cause of action it must necessarily and logically follow that any judgment based upon such complaint cannot be upheld. The language of the Supreme Court of the United States, in *Wheeler v. Nesbitt*, 24 How. 544, 16 L. Ed. 765, quoted by the Supreme Court of Arizona in *Griswold v. Horne*, 19 Ariz. 63, 165 Pac. 320, L. R. A. 1918A, 865, is enlightening upon the question under consideration. It reads as follows: 2

"Undoubtedly, every person who puts the criminal law in force maliciously, and without any reasonable or probable cause, commits a wrongful act; and if the accused is thereby prejudiced, either in his person or property, the injury and loss so sustained constitute

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the proper foundation of an action to recover compensation. Malice alone, however, is not sufficient to sustain the action, because a person actuated by the plainest malice may nevertheless prefer a well-founded accusation, and have a justifiable reason for the prosecution of the charge. Want of reasonable and probable cause is as much an element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecutor to make the accusation; and, though the averment is a negative one in its form and character, it is nevertheless a material element of the action, and must be proved by the plaintiff by some affirmative evidence, unless the defendant dispenses with such proof by pleading singly the truth of the several facts involved in the charge."

There are other alleged errors assigned but an examination of the record does not show that they were prejudicial to the defendant.

It follows that the judgment of the district court must be reversed, and the cause remanded, with directions to grant a new trial and to permit the parties to amend the pleadings if they so elect. Appellant to recover costs on appeal.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

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#### ADAMSON v. ADAMSON et al.

No. 3422. Decided March 6, 1920. (188 Pac. 635.)

1. DIVORCE—GRANTING OF ALIMONY DISCRETIONARY. The granting or withholding of alimony is a matter within the sound discretion of the court.<sup>1</sup> (Page 549.)
2. DIVORCE—REFUSAL OF ALIMONY HELD NOT AN ABUSE OF DISCRETION. Where wife was engaged in a business paying her about \$100 a month, and was joint owner with husband in property renting for thirty dollars a month, and where husband was addicted to drink, was without business, and had no property, except the joint interest with the wife in such property and a small lot worth less than \$100, the court's refusal, in giving wife a divorce, to grant her alimony, held not an abuse of discretion. (Page 549.)

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<sup>1</sup> *Stover v. Stover*, 24 Utah, 92, 66 Pac. 766.



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3. **DIVORCE—COMPLAINT HELD INSUFFICIENT AS A CREDITORS' BILL.** Complaint, in wife's action for divorce and alimony and to set aside an alleged fraudulent conveyance of real property from husband to his father, was not sufficient as a creditors' bill, where it did not show that plaintiff had procured a judgment or that defendant was insolvent.<sup>2</sup> (Page 550.)
4. **DIVORCE—HUSBAND'S CONVEYANCE IN PROPERTY JOINTLY OWNED WITH WIFE HELD NOT FRAUDULENT.** Husband's conveyance of his interest in property jointly owned with wife, but on which they did not reside, was not fraudulent as to the wife, who thereafter secured a divorce on the ground of desertion and failure to provide, notwithstanding Comp. Laws 1917, sections 2908, 2992, providing, respectively, that exemption of homestead shall continue in favor of wife upon husband's desertion, and that husband cannot remove wife from homestead without her consent, without in good faith providing another homestead; such statutes having reference only to property on which the husband and wife reside.<sup>3</sup> (Page 550.)
5. **DIVORCE—HUSBAND'S CONVEYANCE OF PROPERTY JOINTLY OWNED WITH WIFE HELD NOT VOID AS TO WIFE, THEREAFTER PROCURING DIVORCE.** Husband's conveyance of his interest in property jointly owned with wife, not constituting a homestead, was not void as to wife, who thereafter obtained a divorce, in which court, under Comp. Laws 1917, section 3000, in rendering decree, determined the property rights of the parties; the husband having had the right to sell his interest without wife's consent, subject only to wife's one-third interest in case she continued to be his wife and survived him notwithstanding section 8346. (Page 551.)
6. **DIVORCE—EVIDENCE HELD TO SHOW PURCHASE OF HUSBAND'S PROPERTY IN GOOD FAITH AND FOR FULL VALUE.** In wife's action for divorce and for cancellation of husband's alleged fraudulent conveyance of interest in land to his father, evidence, held to support finding that the father purchased the property in good faith and paid full value therefor. (Page 552.)
7. **DIVORCE—PURCHASE OF PROPERTY FROM HUSBAND ON INSTALLMENTS NOT CONCLUSIVELY FRAUDULENT.** The fact that price of property purchased from husband was paid in installments is not conclusive of fraud, but at best only raises a presumption. (Page 552.)

Appeal from District Court of Salt Lake County; *W. H. Bramel*, Judge.

<sup>2</sup> *Enright v. Grant*, 5 Utah, 334, 15 Pac. 268; *Idaho Wholesale Grocery Co. v. Robinson*, 182 Pac. 357.

<sup>3</sup> *Nelson v. Peterson*, 30 Utah, 391, 85 Pac. 429.

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Adamson v. Adamson et al., 55 Utah 544.

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Action by Martha A. Adamson against Andrew Adamson, Jr., and another.

From the judgment rendered, plaintiff appeals.

**AFFIRMED.**

*J. W. Rozzelle and Walton & Walton*, all of Salt Lake City, for appellant.

*King, Braffet & Schulder*, of Salt Lake City, for respondents.

THURMAN, J.

This is an action for divorce and alimony and to set aside an alleged fraudulent conveyance of real property. It is also alleged in the complaint that the defendant Andrew Adamson, Jr., has in his possession certain shares of mining stock in various mining companies, and that he, for his own use and benefit, has delivered the same to the other defendant.

The proceeding for divorce was not contested, and a decree therefor, without alimony, was entered. The court also found that the defendant Andrew Adamson, Sr., did not have the mining shares in his possession, nor had he sold or disposed of them, or was holding them for the use of the other defendant.

The findings of the court concerning the divorce and shares of mining stock are not in question. The findings in relation to alimony and fraudulent conveyance of the real property are the only questions to be determined.

As to the real property, the complaint in substance alleges that on or about the 19th day of March, 1916, plaintiff and her husband, Andrew Adamson, Jr., were the joint owners of certain real property, each owning an undivided one-half thereof, in Murray City, Utah, upon which was a building consisting of two apartments of four rooms each, of the value of \$3,000; that said defendant was also the owner of another

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parcel, a lot containing about twenty-four square rods, in the same neighborhood, of the value of \$150; that on or about the 20th day of the same month said defendant, her husband, in violation of her rights, believing that she was about to commence a suit for divorce and in order to defraud her of her said rights in the property, and to prevent the court from awarding said property to her, executed and delivered to the defendant Andrew Adamson, Sr., a bogus conveyance of said property. It alleges upon her information and belief that the said Andrew Adamson, Sr., who is the father of Andrew Adamson, Jr., without consideration, accepted said conveyance, and ever since has wrongfully pretended to be the owner of the property, but, as plaintiff is informed and believes, said defendant holds said property for the use and benefit of the other defendant.

Plaintiff also alleges in an amendment to her complaint that defendant Andrew Adamson, Jr., at the time of said conveyance, was indebted to her in the sum of \$2,300, and that said conveyance was made to defraud her of said indebtedness, and of any alimony that might be awarded her by the court; that said defendant Andrew Adamson, Sr., was cognizant of the state of affairs existing between her and her husband.

The allegations of fraud in the conveyance, and that no consideration was paid therefor, were denied by the defendant Andrew Adamson, Sr., who alleged that he paid for said property the fair market value.

As to the alleged fraudulent conveyance, the court found the issues in favor of the defendant Andrew Adamson, Sr., and that plaintiff was not entitled to alimony in the divorce proceeding. Judgment was entered, quieting the title of said defendant to the property in controversy. Plaintiff appeals, and assigns as error the failure to allow alimony and numerous findings of the court relating to the transfer of the property.

There is nowhere in the assignments of errors, and nowhere in the record, any attempt on the part of appellant to specify particulars in which the evidence is insufficient, notwithstanding practically every finding of the court is challenged on

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that ground. Rule 26 of the practice and procedure of this court in that respect is entirely ignored. The fact that respondent does not raise the objection is not sufficient to justify our passing the matter by without calling it to the attention of the parties litigant. It should be remembered that the rule in question was adopted to inform the court, as well as opposing counsel, of the particular features of the evidence, or omissions therein, upon which the party appealing relies. Where no attempt is made to comply with the rule, the court is oftentimes compelled to wade through masses of unimportant testimony, in order to find that which is material to the error assigned. This has a tendency to produce voluminous opinions, for which the court is sometimes criticized, especially by members of the bar.

With these observations, which are intended only as a reminder of duty, we will proceed to a consideration of the merits.

The evidence tends to show that, commencing with the year 1909 and down to the year 1916, several divorce proceedings occurred between the plaintiff and her husband. It seems to have become a fixed habit for one or the other of them to institute proceedings every once in a while, prior to the commencement of the present action. In the month of March, 1916, plaintiff and her husband were joint owners of a residence property in the town of Murray, Salt Lake county, of the value of about \$2,500. The property consisted of two apartments each containing four rooms and a bath, and was being rented for about thirty dollars per month. At the time referred to there seems to have been a temporary suspension of hostilities between the parties; nevertheless there were mutterings of discontent portending the probability that another action by plaintiff might be commenced at any time.

Defendant Adamson, Jr., husband of the plaintiff, had been trying for some time to sell his interest in the real property which is the subject of this action, but was unable to find a purchaser. He and plaintiff had separated some time before, and were living apart at the time referred to. Plaintiff had refused to join in the conveyance, so that he was seeking to

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dispose of his interest alone. About this time he negotiated a deal with his father, the other defendant, who purchased the property, paying therefor the sum of \$1,250; \$250 was paid in cash, the remainder in two installments, \$500 during the same year and \$500 in the next year succeeding. More than a year elapsed thereafter before this action was commenced. During that interval there was more or less trouble between plaintiff and Adamson, Sr., concerning the rent of the property. There was also litigation between him and some of the tenants. It is quite clear, however, from the testimony, that plaintiff received substantially all the rent money from the premises and paid the taxes assessed thereon.

For the last four or five years plaintiff has been living in Salt Lake City, conducting a rooming house, by means of which she has made her living. Her husband, during periods of amicable relations, lived with her down to about the year 1915, since which time they have been living apart. The evidence also tends to show that plaintiff's husband was indebted to her in the sum of about \$2,300 at the time he conveyed the property to his father.

There is no evidence in the record concerning the question of alimony, the amount that should be awarded, defendant's ability to pay, or that plaintiff's necessities require that alimony should be allowed. Plaintiff's rooming house business was paying her about \$100 per month. Besides this, she had her interest in the residence property in question. As to whether she had any other property the record is silent. The defendant husband was addicted to drink, was without business, and as far as the record discloses had no property, except the property in dispute and the small lot referred to, which, as shown by the evidence, was worth less than \$100, and was included in the conveyance made to his father. In these circumstances, the court, while granting the divorce for desertion and failure to provide, refused to allow alimony or costs of suit.

The granting or withholding of alimony in a divorce proceeding is a matter within the sound discretion of the court. In the case at bar we are not disposed to hold 1, 2

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that the discretion was abused. There were no minor children dependent upon plaintiff. She had, as herein shown, a business which provided her with a living, and without some evidence indicating that plaintiff was in needy circumstances, and that defendant was able and ought to contribute to her support, we do not feel warranted in holding that the conclusion of the trial court was error. Besides this, as before suggested, there was no testimony whatever concerning alimony, or the necessity therefor, or as to any specific amount.

The case of *Stover v. Stover*, 24 Utah, 92, 66 Pac. 766, cited by appellant, sheds no light on the question here. The court in that case granted a divorce to the wife on the grounds of desertion and failure to provide. It found that defendant was able and willing to support, maintain, and educate the children, and that the plaintiff was not. It awarded the custody of the minor children to the defendant, and awarded alimony to the plaintiff in the sum of twenty-five dollars. The point was made that the decree was inconsistent with the findings, and this court reversed the judgment. A casual glance at the case discloses the fact that it differs from the case at bar in nearly every essential particular. This is the only case cited by appellant on this particular question. We find no error in the conclusion reached by the trial court.

The court found that the conveyance was not fraudulent and that Andrew Adamson, Sr., by the conveyance in question became the owner of the property. This finding is the subject of attack by nearly all the assignments of error. In its written opinion, made part of the bill of exceptions, the trial court held that the complaint is not sufficient as a creditors' bill inasmuch as it does not show that plaintiff had procured a judgment or that defendant was insolvent. The court cites the following authorities which seem to support its contention: 5 Ency. Pl. & Pr. 562; *Enright v. Grant*, 5 Utah, 334, 15 Pac. 268; *Idaho Wholesale Grocery Co. v. Robinson*, 182 Pac. 357. 3

Appellant's counsel in their reply briefly recite the fact that the divorce was granted on the ground of desertion and failure to provide. They then call our attention 4

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to Comp. Laws Utah 1917, section 2908, which provides that in case the husband or wife deserts his or her family the exemption of homestead shall continue in favor of the one residing on the premises. Manifestly this has no application to the property in dispute, for it had not been resided on by either of the parties for several years. Counsel also refer to section 2992 of the same statute, which provides that neither the husband nor the wife can remove the other or their children from their homestead without the consent of the other, unless the owner of the property shall in good faith provide another homestead suitable to the condition in life of the family. Clearly this provision also relates to a home where the family resides. In the present case the wife was living in Salt Lake City, and had been for many years, and in any event she owned a half interest in the premises in question, which consisted of two apartments, and no attempt was made to deprive her of her interest in the property.

Counsel also refer us to section 8346 of the same statute, which makes it a felony for any person to falsely represent himself as competent to sell or mortgage any real estate to the validity of which sale or mortgage the assent or concurrence of his wife is necessary. In view of the fact that this court, in *Nielson v. Peterson*, 30 Utah, 391, 85 Pac. 429, held that, where no declaration of a homestead has been made by either husband or wife, a mortgage given by the husband was valid and subject to foreclosure, it is difficult to understand what application can be made of that section to the case at bar. There is no pretense here that either husband or wife had made a declaration of homestead concerning the property in controversy. Under the authority above cited the husband had the right to sell his interest, subject only to his wife's one-third interest in case she continued to be his wife and survived him. In this case she did not continue to be his wife; she procured a divorce in the present action, and the court, in the same decree which gave her a divorce, likewise determined the property rights of the parties. This the court had the power to do. Comp. Laws Utah 1917, section 3000, provides that, where an interlocutory de-

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cree of divorce is made, the court may make such order in relation to the children, property, and parties, and to maintenance of the parties and children, as shall be equitable.

Counsel refer us to other sections of the Compiled Laws, but in our opinion they have no bearing upon the question here presented. It is extremely doubtful if we have not gone further than we should have done in considering the questions relating to homestead and homestead rights. No such question was raised in the court below, and as far as the record discloses the trial court had no opportunity to consider it. The complaint makes no claim of homestead rights, nor did the contention of plaintiff in the trial court present any such question.

The testimony in this case strongly tends to show that the defendant Adamson, Sr., purchased the property in good faith, and the testimony is quite conclusive that he 6, 7 paid for it all that it was worth. The plaintiff herself testified the value of the entire property was \$2,500. Defendant paid half that sum for a one-half interest. The fact that the amount was paid in installments is not conclusive of fraud. At best it only raises a presumption. The court undoubtedly, in arriving at its conclusion, considered this feature, together with the other circumstances disclosed by the evidence.

After a careful review of all the evidence, we are not prepared to hold that any finding of the court is against the clear preponderance of the evidence, or that the conclusions and decree are not supported by the findings.

The judgment of the trial court is affirmed, at appellant's cost.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.



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Appeal from Fifth District.

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## STATE v. SCOTT.

No. 3430. Decided March 11, 1920. (188 Pac. 860.)

1. **WITNESSES—STATE MAY NOT IMPEACH OWN WITNESS BY SHOWING REPUTATION, BUT MAY SHOW INCONSISTENT STATEMENTS.** The state may not impeach its own witness by showing his general reputation for truth and veracity, but, where a witness makes conflicting statements, may call his attention to such statements, and in case he has misled or deceived the state to its prejudice, it may, under certain circumstances, produce the persons who heard him make the statements which conflict with his testimony, and show by them what the witness said.<sup>1</sup> (Page 559.)
2. **WITNESSES—ERROR TO PERMIT PROSECUTOR TO INTERROGATE OWN WITNESS FOR PURPOSE OF IMPEACHMENT.** The court erred in permitting prosecuting attorney to interrogate a witness for the state for the purpose of impeachment by showing inconsistent statements, where the witness made no contradictory statements, and had not misled the state as to what his testimony would be. (Page 559.)
3. **WITNESSES—STATE CANNOT ASSAIL OWN WITNESS FOR PURPOSE OF IMPEACHMENT.** In a criminal prosecution, when a dealer testified as to time that accused bought certain articles from him, and defendant on cross-examination introduced a sales slip showing a sale of the articles on a date other than that contended by the state to be the date of the sale, the court erred in permitting the state to assail the dealer and interrogate him for the purpose of impeachment, or to reflect upon the motives of the witness and his veracity, merely because the dealer insisted that the date on the sales slip was the date upon which the transaction was had. (Page 561.)
4. **CRIMINAL LAW—COURTS TAKE JUDICIAL NOTICE OF NATURAL LAWS AND TIME OF SUNSET.** Courts are bound to take judicial notice of natural laws, and hence that at Milford the sun set on the evening of December 13th at 5 o'clock, that darkness of night set in at 6 o'clock, and that it was completely dark before 7 o'clock, and that the sun passes below the horizon more nearly perpendicularly in winter than in summer, and that twilight is correspondingly shorter in winter than it is in summer.<sup>2</sup> (Page 562.)

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<sup>1</sup> *State v. Inlow*, 44 Utah, 499, 500, 141 Pac. 530, Ann. Cas. 1917A, 741.

<sup>2</sup> *Preece v. O. S. L. R. Co.*, 48 Utah, 560, 161 Pac. 43.

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5. **CRIMINAL LAW—LATITUDE IN CROSS-EXAMINATION NOT DISTURBED EXCEPT FOR ABUSE OF DISCRETION.** While it is true that much latitude must be allowed to the trial courts in permitting cross-examination of witnesses, and that their rulings in that regard will not be disturbed, unless it is made to appear that the discretion with which the law invests them has been abused, yet when it is manifest that legitimate bounds of cross-examination by the state of its own witness has been transcended to the prejudice of the defendant, a judgment of conviction cannot stand. (Page 562.)
6. **RAPE—PROOF OF FEMALE'S UNCHASTITY NOT COMPETENT WHERE ACCUSED DENIES ANY SEXUAL RELATIONS.** In a rape case, where defendant denied that he was with the prosecutrix on the night in which he was alleged to have committed the wrongful act, or that he ever had sexual intercourse with her, accused was not entitled to prove that the general reputation of the prosecutrix for chastity was bad, at least when not introduced for the purpose of affecting the credibility of the prosecutrix. (Page 563.)
7. **RAPE—GENERAL REPUTATION OF PROSECUTRIX FOR UNCHASTITY COMPETENT WHERE SEXUAL ACT IS ADMITTED.** Where defendant in prosecution for rape by force admits the sexual act, or contends that the prosecutrix consented thereto, evidence that the general reputation of the prosecutrix for chastity was bad is admissible.<sup>3</sup> (Page 563.)
8. **RAPE—PROOF OF UNCHASTITY OF PROSECUTRIX INADMISSIBLE IN STATUTORY PROSECUTION.** It is inadmissible in a prosecution for statutory rape, where sexual intercourse is had with a female under the age of consent, to prove that the general reputation of the prosecutrix for chastity is bad. (Page 564.)
9. **RAPE—PROOF OF SPECIFIC UNCHASTE ACTS ON THE PART OF PROSECUTRIX INADMISSIBLE.** If it is desired to prove that a prosecutrix in a rape case is a lewd woman, that may only be done by attacking her general reputation for chastity and morality, and not by showing specific acts of wrongdoing. (Page 566.)
10. **CRIMINAL LAW—OTHER ACTS OF INTERCOURSE BETWEEN PROSECUTRIX AND ACCUSED ORDINARILY COMPETENT.** That the prosecutrix in a rape case has had intercourse with the defendant at other times than the one in question may ordinarily be shown. (Page 566.)
11. **WITNESSES—PROOF OF INTERCOURSE WITH THIRD PERSON SOMETIMES COMPETENT TO SHOW MOTIVE OF PROSECUTING WITNESS.** In

<sup>3</sup> *State v. McCune*, 16 Utah, 176, 51 Pac. 818.

<sup>4</sup> *State v. Thorne*, 39 Utah, 208, 117 Pac. 58; *State v. Vance*, 38 Utah, 1, 110 Pac. 434.

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a prosecution for rape, where it was the theory of defendant that prosecutrix had intercourse with a third person, and that, to shield herself in view of supposed pregnancy, she wrongfully charged defendant with the offense, the accused had the right to prove by the prosecutrix on cross-examination that such was her purpose in lodging the complaint, and to establish that fact, could prove that she had had intercourse with such third person. (Page 566.)

12. **WITNESSES—IMPROPER TO PERMIT CROSS-EXAMINATION OF ACCUSED IN RAPE CASE CONCERNING DIVORCE FROM WIFE.** In a prosecution for rape, cross-examining defendant with respect to his obtaining a divorce from his first wife, and when he obtained it, thereby intimating that he had commenced keeping company with his present wife before he had obtained the divorce from his first wife, was entirely collateral to any issue in the case. (Page 566.)
13. **WITNESSES—COLLATERAL FACTS MAY SOMETIMES BE SHOWN ON CROSS-EXAMINATION OF DEFENDANT TO A LIMITED DEGREE.** While collateral facts may very often be shown on cross-examination to affect the credibility of an accused, and while such matters are largely within the sound discretion of the trial courts, there must be a limit to the introduction of collateral matter.<sup>4</sup> (Page 566.)
14. **WITNESSES—CROSS-EXAMINATION OF DEFENDANT BY REPEATING TESTIMONY OF PROSECUTRIX HELD IMPROPER.** Where accused on his examination in chief denied the rape, and denied that he was with the prosecutrix on the occasion testified to by her, it was error for the prosecuting attorney on cross-examination to repeat in his questions all that was testified to by prosecutrix by asking numerous questions in each one of which some fact or facts stated by her were included. (Page 567.)
15. **WITNESSES—IMPROPER FOR PROSECUTING ATTORNEY TO CROSS-EXAMINE CHARACTER WITNESS AS TO OWN CHARACTER.** In a prosecution for rape, where defendant produced a witness to testify that the general reputation of the prosecutrix for truth and veracity was bad, it was error for the court on cross-examination to permit the prosecuting attorney to ask the witness as to what his reputation was in the community for truth and veracity; his own reputation being foreign to matter testified to in chief. (Page 568.)
16. **WITNESSES—STATE MAY IMPEACH CHARACTER WITNESS.** The state has the right to impeach a witness produced by defendant, in a prosecution for rape to testify as to the female's reputation for truth and veracity, by showing that his general reputation for truth and veracity is bad, or can assail his credibility by the usual methods. (Page 568.)

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17. **CRIMINAL LAW—REMARK BY COURT THAT WITNESS INTERROGATED NEED NOT INCRIMINATE HIMSELF HELD IMPROPER.** In a criminal prosecution, where defendant produced a witness to testify that the general reputation of the prosecutrix for truth and veracity was bad, and the prosecuting attorney on cross-examination asked, "What is your reputation for truth and veracity?" The court's ruling, "I don't think he is required to convict or incriminate himself," was improper as necessarily destroying the whole effect of the witness' impeaching testimony. (Page 568.)
18. **CRIMINAL LAW—JURY SHOULD BE INSTRUCTED THAT PROSECUTRIX HAS INTEREST IN RESULT OF CASE.** In a prosecution for rape, the court erred in instructing that it was the province of the jury to weigh the testimony of the female "as of any other witness testifying in the case," since the court should point out that the prosecutrix necessarily has a greater interest in the result of such a case than a disinterested witness would have, and that the jury should consider and weigh her testimony with that fact in mind. (Page 570.)
19. **CRIMINAL LAW—REVERSIBLE ERROR FOR PROSECUTING ATTORNEY TO TELL JURY THAT IT WAS AGAINST LAW TO IMPEACH DEFENDANT.** In a criminal prosecution, it was prejudicial error for the prosecuting attorney in his closing argument to the jury to state that it was against the law to impeach the defendant for truth and veracity until he himself had first put his reputation in issue, the court's only caution being that the jury should pay no attention to what counsel said, but should confine their deliberations to the evidence where the liberty of the defendant depended upon the statement of one witness as against the statements of others. (Page 571.)

Appeal from District Court, Fifth District, Beaver County;  
*D. H. Morris*, Judge.

Frank Scott was convicted of rape, and appeals.

REVERSED and REMANDED, with directions to grant a new trial.

*W. F. Knox*, of Beaver City, for appellant.

*Dan B. Shields*, Atty. Gen., *James H. Wolfe*, *O. C. Dalby* and *H. Van Dam, Jr.*, Asst. Attys. Gen., for the State.

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FRICK, J.

The defendant was charged with the crime of rape, and was convicted in the district court of Beaver county and appeals.

For the reasons hereinafter stated we feel compelled to reverse the judgment of conviction and to remand the cause for a new trial. For that reason, and because no good purpose could be subserved by stating the evidence, we shall refrain from doing so, except in connection with and to the extent only that it is necessary to elucidate the particular point decided.

The defendant has assigned a large number of errors. We shall, however, limit our discussion to such only as are deemed material.

The question that is involved in the first assignment arose as follows: At the preliminary hearing before a justice of the peace the state produced the prosecutrix as a witness, who, in effect, stated that on the evening of December 13, 1917, she, at the request of the defendant, started with him from the town of Milford to the town of Beaver, in Beaver county, but that they did not reach the latter place; that they started from a certain café owned by one Frank Mishina, a Jap, at about 7:30 p. m. and that Mishina saw them start from said café. The state also produced said Mishina at the preliminary hearing, who upon being questioned by the prosecuting attorney, in substance testified that the prosecutrix was employed by him in his café as a waitress, and that the defendant was one of his customers; that the prosecutrix at a certain time, the exact date he could not state, but about a week or a week and a half before Christmas, left the café one evening at about 7:30 o'clock, but he did not see, and could not state, and did not know, with whom she went away. At the trial in the district court the prosecutrix was again produced as a witness, and again testified to the facts before stated. Mishina was also again called by the state, and he stated the same facts in practically the same language as he had done before the justice of the peace. The prosecuting attorney was not

satisfied with the Jap's statements that he did not see the prosecutrix and defendant leave the café on the evening in question, and that he did not know with whom she went away. The prosecutor then asked the witness whether he, had not stated to the sheriff in the presence of others, naming them, that he saw the prosecutrix and the defendant leave his café on the evening in question. The witness denied the statements attributed to him, and the prosecuting attorney, over the objections and exceptions of defendant's counsel, was permitted to ply the witness with very leading and suggestive questions, in which the veracity and credibility of the witness were vigorously assailed. The prosecuting attorney was also permitted to state in the presence of the jury that he expected to call the sheriff and the other persons named by him to contradict the witness. On being cautioned by the court he did not disclose what he expected to prove by them. While the court permitted the prosecuting attorney to put leading questions to the witness and to ask him concerning certain assumed or supposed statements, it, nevertheless, refused to permit the prosecuting attorney to call the sheriff and the other persons to impeach the witness. Counsel for the defendant, vigorously assails the court's rulings in permitting the leading questions, and insists that they constitute prejudicial error.

It is elementary that the state may not impeach its own witness by showing his general reputation for truth and veracity. It is, however, also elementary that the state, like all other litigants, in case a witness makes conflicting statements, may call his attention to such conflicting statements, and, in case he has misled or deceived the state to its prejudice, it may, under certain circumstances, produce the persons who heard him make the statements which conflict with his testimony and show by them what the witness said. We have no such case here, however. Here the witness, when under oath, adhered to the same statements throughout the entire examination. Moreover, the state always knew precisely what his statements were, and as a matter of course could not have been deceived or misled by anything he testified to. Then, again,

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the witness did not question or deny the fact that the prosecutrix left the café with the defendant, as stated by her. All that he insisted upon from first to last was that he did not see them leave the café, and did not know with whom she left, nor did he know the precise date of her leaving. There was, therefore, not the slightest ground on which to base the state's attempted impeachment. Nor was there any 1 reason which would authorize the state to contradict the statements of the witness. Hence it was a gross injustice to him to even indirectly assail his veracity as was done. The most that can be said is that the statements of the witness did not come up to the expectation of the prosecuting attorney in the matter. In view of all the circumstances, however, the state did not even have any reason to expect any other statements from the witness than were made by him. This case, therefore, clearly comes within the doctrine stated in 40 Cyc. 2696, namely:

"The mere fact that a witness has failed to testify as expected does not warrant impeaching him by proof of prior statements in conformity to what he was expected to testify; but proof of prior contradictory statements of a party's own witness is admissible only where the witness has given affirmative testimony hostile or prejudicial to the party by whom he was called; and in such case the proof must be confined to contradictions of the testimony of the witness which is injurious to the party seeking to impeach him."

The rule ordinarily applicable where conflicting statements of a witness are admissible is also stated by this court in *State v. Inlow*, 44 Utah, 499, 500, 141 Pac. 530, Ann. Cas. 1917A, 741.

The rule stated in Cyc. is fully supported in *Bullard v. Pearsall*, 53 N. Y. 230, and in *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560.

The court therefore committed manifest error in permitting the prosecuting attorney to interrogate the witness in the manner hereinbefore stated. In view of what is disclosed by the record the court might just as well have 2 permitted the prosecuting attorney to produce the impeaching witnesses and permit them to testify fully respecting the alleged statements. To have done that might, perhaps

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have been less prejudicial than what was in fact permitted.

What has been said respecting the witness Mishina is equally true respecting the testimony of the witness Larsen. While it is true that the prosecuting attorney did not attempt to show that Larsen made conflicting statements, he was nevertheless permitted, by means of leading and suggestive questions and otherwise, not only to seriously reflect upon the motives of the witness, but also to seriously assail his veracity, all of which was wholly uncalled for. The controversy respecting this witness arose over a certain sales slip which defendant's counsel introduced in evidence as part of the cross-examination of the witness. The materiality of the sales slip arose as follows: The prosecutrix testified that on the evening of the 13th of December, 1917, the evening in question, defendant, in her presence, had purchased from the witness Larsen four lamp globes for use on his car. The defendant denied that he was out with the prosecutrix on the evening in question, and the sales slip showed that the four lamp globes were purchased by the defendant from the witness Larsen on August 5, 1917, and not on December 13th. The evidence of the witness Larsen also was to the effect that the four lamp globes in question were the only ones that were purchased by the defendant from the witness. While the witness had also testified at the preliminary hearing, yet he, at that time, was not interrogated concerning the sales slip. In view, therefore, that the date on the sales slip was in sharp conflict with the statement made by the prosecutrix respecting the time when the lamp globes were purchased, the prosecuting attorney, it seems, was quite desirous to destroy the effect of the sales slip, and in doing so, over the objections of the defendant, was permitted to cross-examine his own witness at great length upon the theory that he was a "hostile witness." There is absolutely nothing in the record from which it can legitimately be inferred that the witness was either favorable to the defendant or hostile to the state. Indeed, the witness seemed to be quite fair and impartial. We thus have a single transaction, which was evidenced by a sales slip issued by a clerk or bookkeeper of the witness in due course of business.



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This sales slip, in due time, was delivered to the defendant, and at the time when he paid for the lamp globes, and he in turn delivered it to his counsel, who produced it at the trial and introduced it in evidence as a part of the cross-examination of the witness Larsen, as he had a perfect right to do. So far as the record shows, the transaction was quite regular. Moreover, it seems that the sales slip had passed from Larsen's mind until it was recalled to his attention at the trial. The sales slip thus merely showed a transaction between a dealer and a customer. It so happened, however, that the date on which the transaction evidenced by the sales slip was had became quite material in this case, for the reason that the date on the sales slip showing the transaction did not agree with the statement of the prosecutrix, and in view that Mr. Larsen had testified that the sales slip correctly evidenced the transaction the prosecuting attorney assumed that Larsen was hostile to the interests of the state, and that he, for that reason, was unfair, if not untruthful. It must be apparent to all, however, that the defendant had precisely the same right to show the real date on which the lamp globes were purchased that the state had. To do that he had precisely the same right to approach the witness Lar- 3 sen that the state had. Indeed, the defendant, being related to the transaction, under no circumstances, could be charged as interfering with the state's rights in seeking to establish the actual date of the transaction by producing the sales slip, although the date on the sales slip did not agree with the statements of the prosecuting witness. Nor can the state assail the dealer merely because he insisted that the date on the sales slip was the date upon which the transaction was had.

There is also a circumstance disclosed by the record which somewhat militates against the statement of the prosecuting witness, and, to some extent at least, is corroborative of Mr. Larsen's statement that the transaction of purchasing the lamp globes occurred earlier in the season than the time stated by the prosecutrix. She most emphatically testified that she did not leave work on the evening in question until seven

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o'clock p. m., and that she and the defendant left the café at about seven-thirty and not before. In that regard she testified as follows:

"Q. Was it dark at 6 o'clock when Mr. Scott came to supper and asked you to go out for a ride or a dance or a show? A. No, sir. It was not dark. Q. Do you remember if it was dark at seven [o'clock]? A. Sure it was not dark; it was just getting about dusk, and it was not right dark at seven-thirty. Q. It wasn't dark yet at seven-thirty. Are you sure about that? A. I certainly am. Q. You certainly are? A. Yes, sir."

We are bound to take judicial notice of natural laws, and hence we know that at Milford the sun set on the evening of the 13th of December at five o'clock. We further know that in view that the sun passes below the horizon more nearly perpendicularly in winter than in summer twilight is correspondingly shorter in winter than it is in summer. The sun, therefore, had passed below the horizon December 13th for one full hour at six o'clock, two hours at seven o'clock, and two and one-half hours at seven-thirty o'clock. We therefore know that so far as the sun was concerned the darkness of night had set in at six o'clock, and was complete long before seven o'clock, since the sun had passed beneath the horizon fully two hours by that time. If, therefore, the prosecutrix is correct in her statements respecting light and darkness, then the occurrences she testified to must have taken place earlier in the season, just as defendant says they did. Respecting the length of twilight in summer in this latitude, see *Preece v. O. S. L. R. Co.*, 48 Utah, 560, 161 Pac. 43. It was therefore impossible that it was merely getting "dusk" at six o'clock, and was not yet dark at seven o'clock on the 13th of December. Such a condition was, however, most natural earlier in the season. According to the state's own evidence, 4, 5 therefore, there was no reason whatever for assailing Mr. Larsen's statements as was done. We have no doubt that both the court and the prosecuting attorney were conscientious in assuming the attitude they did in this matter, but that in no way can relieve us from the duty of reversing judgments of conviction when such convictions are not obtained in accordance with the rules of law and evidence and to the

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prejudice of the substantial rights of the defendant in the case. While it is true that much latitude must be allowed to the trial courts in permitting cross-examination of witnesses, and that their rulings in that regard will not be disturbed unless it is made to appear that the discretion with which the law invests them has been abused, yet when it is manifest, as it is here, that the legitimate bounds of cross-examination by the state of its own witnesses have been transcended to the prejudice of the defendant, it would be a reproach to the law, and, to say the least, a reflection upon the administration of justice, if we upheld a conviction thus obtained.

It is next urged that the court erred in refusing to permit the defendant to prove that the general reputation of the prosecutrix for chastity was bad. In other words, that she was reputed to be unchaste in the community where she lived. Defendant's counsel insists that under the authorities such evidence was proper. In view that the defendant denied that he was with the prosecutrix on the night in question, and denied that he had had sexual intercourse with her then or at any time, we cannot conceive how such evidence had any relevancy in this case, except perhaps to affect the credibility of the prosecutrix. It was however, not offered for that purpose, and it is not contended here that it should have been admitted for that purpose. Where the defendant admits the sexual act, but contends that the prosecutrix consented thereto, and where as here, she is of lawful age, such 6, 7 evidence is relevant and material upon the question of consent. While it is true that even a prostitute may refuse consent to the sexual act, yet, in contemplation of law, a lewd woman is much more likely to consent to such an act than a chaste woman would be; hence evidence that the prosecutrix was generally reputed to be unchaste is relevant for the purpose just stated. The law upon this question is well stated by the Supreme Court of Florida in *Rice v. State of Florida*, 35 Fla. 236, 17 South. 286, 48 Am. St. Rep. 245. The court, in discussing the relevancy of such evidence in a case like the one at bar, at pages 239 and 240 of 35 Fla., 17 South. 286, 287 (48 Am. St. Rep. 245), says:

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"Considering the line of defense adopted by the defendant, no injury could have been done him by ruling out this testimony. The only purpose for which such testimony was offered was to show a probability of consent on the part of the prosecutrix to the act of the defendant. The defense was not based upon any theory of consent to the act, but upon a denial by the defendant that he had ever had any carnal intercourse whatever with the girl. Therefore the testimony was wholly immaterial, and could not have any reference to the defense made by the defendant. *McDermott v. State*, 13 Ohio St. 332 [82 Am. Dec. 444]; *Strang v. People*, 24 Mich. 1, text, 7; *People v. McLean*, 71 Mich. 309, 38 N. W. 917 [15 Am. St. Rep. 263], and English case cited therein. See, also, 19 Am. and Eng. Ency. of Law, pp. 961, 962; 3 Am. and Eng. Ency. of Law, p. 158, note, and American and English authorities collated; *Wilson v. State*, 17 Texas Ct., App. 525, and Texas and other cases collated therein; *Shirwin v. People*, 69 Ill. 55; *State v. Jefferson*, 6 Ired. [28 N. C.] 305; *State v. Fitzsimon* [18 R. I. 236] 27 Atl. 446 [49 Am. St. Rep. 766]."

See, also, 22 R. C. L. page 1208, section 42, where it is said: .

"The general rule is that, in prosecutions for rape, evidence of the prior unchastity of the prosecutrix as a substantive defense is inadmissible. Where, however, the defense rests on the fact of consent the character of the prosecutrix for unchastity is competent evidence as bearing on the probability of her consent to the act with which the defendant is charged, and the likelihood of her resisting the advances of any man, on the ground that it is more probable that an unchaste woman assented to such intercourse than one of strict virtue."

A large number of cases, to which it is not necessary to refer, are cited in support of the text quoted.

See, also, *State v. McCune*, 16 Utah, 176, 51 Pac. 818, and *Lee v. State*, 132 Tenn. 655, 179 S. W. 145, L. R. A. 1916B, 963.

Such evidence is inadmissible, however, in what is generally termed statutory rape, that is, where sexual intercourse is had with a female under the age of consent, for any purpose. See *State v. Hülberg*, 22 Utah, 27, 61 Pac. 8 215, and *State v. Williamson*, 22 Utah, 248, 62 Pac. 1022, 83 Am. St. Rep. 780. While it is true that it is said in *State v. McCune*, supra, that such evidence is proper to affect the credibility of the prosecutrix, yet, as pointed out before, that question is not presented in this case, and hence we express no opinion upon it.

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During the progress of the trial defendant's counsel was permitted to interrogate the prosecutrix with regard to whether she had had sexual intercourse with a certain individual, naming him, and whether she did not believe that she was pregnant as a result of that intercourse. She admitted that when she lodged the complaint against the defendant on the 15th of January, 1918, she believed she was pregnant, but insisted that if she was the pregnancy was the result of the defendant's forcible intercourse with her. She also frankly conceded that she was mistaken with regard to that matter, and that she was not pregnant at any time. It should also be stated here that the prosecuting attorney, in his examination in chief, proved by the prosecutrix that she at no time had had sexual intercourse with any one except with the defendant, and with him only once, namely, on the night in question. In ruling upon defendant's attempts to prove on cross-examination of the prosecutrix that she had had sexual intercourse with the individual before referred to, the court repeatedly announced that it would be proper for the defendant to show on cross-examination of the prosecutrix that she had had sexual intercourse with others than the defendant, but if the prosecutrix denied such intercourse the court would not permit the defendant to contradict her or to prove the fact otherwise than by her admissions. In this regard the court was in error. The authorities are very numerous, indeed the great weight of authority is to the effect, that the prosecutrix cannot be interrogated on cross-examination as to whether she had had sexual intercourse with others than the defendant. The doctrine is based upon the fact, and the great weight of authority is to the effect, that specific acts of intercourse with others than the defendant may not be shown. If it is desired to prove that the prosecutrix is a lewd woman, that may only be done by attacking her general reputation for chastity and morality, and not by showing specific acts of wrongdoing. The rule is well and clearly stated in the case of the *State v. Ogden*, 39 Or. 195, 65 Pac. 449. In the course of the opinion, after stating that some courts have admitted specific acts of intercourse, it is said:

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"The great weight of authority, however, is opposed to this view, and supports the proposition that evidence of specific acts of unchastity on the part of the prosecutrix with others than the defendant is inadmissible."

A large number of cases in support of the text are cited, to which we shall not refer here. As a matter of course, if the prosecutrix has had intercourse with the defendant at other times than the one in question, that fact may ordinarily be shown. It was the theory of counsel for the defendant, however, that the prosecutrix in this case had had intercourse with the individual heretofore referred to; that she tried, but was unable, to see such individual, and that for that reason and in order to shield herself in view of her supposed pregnancy she wrongfully charged the defendant with the offense. No doubt if such were the case the defendant would have the right to prove by her on cross-examination, if he could, that such was her purpose in lodging the complaint against the defendant, and, in order to establish the fact, he no doubt would be permitted to prove that she had had intercourse with the individual aforesaid. Under such circumstances it is always proper to show the motives of the prosecuting witness, and, if such be the fact, that she is wrongfully accusing the defendant either to shield herself or to shield another. 33 Cyc. 1454, 1455; *Shoemaker v. State*, 58 Tex. Cr. R. 518, 126 S. W. 887.

It is next contended that the court erred in permitting the prosecuting attorney to cross-examine the defendant with respect to his obtaining a divorce from his first 12, 13 wife, and when he obtained it. We think the contention is well founded. The cross-examination in that regard was very prejudicial to the defendant, in that it was thereby intimated that he had commenced keeping company with his present wife before he had obtained a divorce from his first wife. That was not a matter of legitimate cross-examination. It was entirely collateral to any issue in the case. It is true that collateral facts may very often be shown on cross-examination to affect the credibility of the defendant, and it is also true that such matters are largely within the sound discretion of the trial courts. There must, however, be a limit to the

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introduction of evidence respecting collateral matters. No hard and fast rule can be promulgated which can be enforced in every case. Each case, to a large extent, must depend upon its own circumstances, and trial courts should be very careful not to transcend the bounds of legitimate cross-examination in that regard. While under certain circumstances such evidence may be quite important and proper, and while in other cases the courts may have gone too far and yet no prejudice may have resulted, such is not the case here. Here the collateral matters respecting the defendant's divorce were clearly improper, and were necessarily prejudicial to his rights. For a discussion of what is and what is not legitimate cross-examination of one accused of crime respecting collateral matters, see *State v. Thorne*, 39 Utah, 208, 117 Pac. 58; *State v. Vance*, 38 Utah, 1, 110 Pac. 434.

In this connection and in view that the case must be remanded for a new trial, we feel constrained to add that the cross-examination of the defendant was improper upon another point. The defendant upon his examination in chief denied the intercourse, and denied that he was with the prosecutrix on the occasion testified to by her, and fully explained where he was during all of the time testified to by her and what he did. His statements in that regard were fully corroborated by other witnesses. In cross-examining the defendant, however, the prosecuting attorney repeated all that was testified to by the prosecutrix by asking numerous questions, in each one of which some fact or facts stated by her were included. In many of these questions the prosecuting attorney also placed his own construction on what the prosecutrix had testified to. Such a method of cross-examination is not only very improper, but it is quite unfair in that by 14 that means what the prosecutrix testified to is constantly kept before the jury. By pursuing such a method the cross-examiner is permitted to repeat over and over again the testimony of his witnesses, or some of them, which he would not be permitted to do in any other way. He would not have been permitted to recall the prosecutrix and have her repeat all that she had testified to in order to impress the jury with

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the importance of her testimony, yet that, in effect, is precisely what was done in this case. Indeed, the method pursued was more objectionable, if possible, than the one just suggested, for the reason that the defendant on cross-examination of the witness might perhaps have shown that she in some particulars was not adhering strictly to her former statements. The court, in order to protect the rights of the accused who is on trial, should on his own initiative prevent counsel on either side from pursuing such a course on cross-examination.

Another assignment assails the ruling of the court in stating its reason why it did not require a certain witness for the defense to answer a certain question on cross-examination. The defendant produced a witness who testified that the general reputation of the prosecutrix for truth and veracity was bad. The prosecuting attorney on cross-examination asked this question: "What is your reputation in the community where you reside for truth and veracity?" Defendant's counsel objected to the question as not proper cross-examination. The court, in ruling on the question, said:

"There is no question in the mind of the court but what you can investigate the character of the witness for truth and veracity, but I don't think he is required to convict or incriminate himself. For that reason the objection is sustained."

The objection should have been sustained for the reason urged by defendant's counsel. The subject to which the witness testified was the reputation of the prosecutrix. His own reputation was about as foreign to hers as two subjects could well be. True, the state had the right to impeach the witness by showing that his general reputation for truth and veracity was bad, or could have assailed his credibility by the usual methods, but it could not do that in the manner attempted. Moreover, the reason given by the court was erroneous. It, to say the least, would be somewhat disconcerting, if not humiliating, to a witness, when called to testify concerning the general reputation of a certain witness, and after having done so, to be told that he need not answer a question put to him on cross-examination concerning his own reputation for the reason that it might be self-incrimin-



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ating. It would be far better for the witness if he were permitted to answer the question, although very improper. It requires no argument to show that to pursue such a course must necessarily destroy the whole effect of the impeaching testimony, and in view of all the circumstances of this case was prejudicial to the rights of the defendant.

It is next insisted that the court erred in charging the jury. The court, among other instructions, gave the following:

*"The court instructs the jury that it is their province to determine the weight and credibility to be given the testimony of a female upon whom it is alleged in an information that a rape has been committed, and who testifies to the facts and circumstances of such rape as of any other witness testifying in the case. And if such testimony creates in the mind of the jury a satisfactory conviction and belief beyond a reasonable doubt of the defendant's guilt, it is sufficient of itself, without other corroborating circumstances or evidence, to justify a verdict of guilty of rape upon the trial of the case."*

The defendant excepted to this instruction, and particularly excepted to that portion which we have italicized. We are of the opinion that the exception is well founded. This precise question was before the Supreme Court of Missouri in *State v. Sykes*, 191 Mo. 62, 89 S. W. 851. The defendant in that case, as here, was charged with rape, and an instruction similar to the one in question here was given. The court, in passing upon the instruction, among other things, said:

*"The instruction, on first reading, and taken alone, would seem to be misleading, in that it tells the jury that the prosecuting witness had no interest in the case whatever other than that of a witness, and that her testimony is to be weighed exactly like that of any other witness in the case."* (Italics ours.)

It is then pointed out that the prosecutrix necessarily has a greater interest in the result of the case than a disinterested witness would have, and that the jury should be instructed to consider and weigh her testimony with that fact in mind. Indeed, it should require no argument to show that the prosecutrix, under circumstances like those disclosed by this record, is vitally interested in the result of the case. Her future reputation to a large extent may be affected by the result, say nothing about the fact that she has a vital interest in vindic-

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eating herself and the attitude she has assumed respecting the prosecution. The jury should therefore be plainly told that they should consider and weigh the testimony of the prosecutrix in view of her interest in the result and also in connection with and in the light of all the other evidence in the case, including all the facts and circumstances as they appear from the evidence, and if after considering and weighing her testimony in the light aforesaid they are satisfied beyond a reasonable doubt and have an abiding conviction that all of the elements of the crime charged against the defendant have been thus established, they may find him guilty upon her testimony alone. In this jurisdiction, where no corroboration of the statements of the prosecutrix is necessary to convict, it is of the utmost importance that the jury be carefully instructed with regard to how her testimony should be considered and weighed; and that is especially true where, as here, her testimony stands practically alone, and must be taken as against what, judging from the record, seems to us to be strong countervailing evidence. If such a course is not followed a shrewd and designing woman of mature years, by selecting her own time and place, may easily ruin any man, and he may be utterly helpless to prevent it. In *State v. Sykes*, supra, the court had, however, sufficiently informed the jury in another instruction respecting the interest of the prosecutrix, and in what light her testimony should be considered and weighed, and for that reason the judgment was not reversed in that case. This is, however, not the case here. In this connection we suggest, however, that it would be better to include the whole question in one instruction.

Finally, it is contended that the judgment should be reversed upon the ground of misconduct on the part of the prosecuting attorney in making the closing argument to the jury. In the bill of exceptions it is made to appear that in his closing argument the prosecuting attorney told the jury that it was against the law to impeach the defendant for truth and veracity until he himself had first put his reputation in issue. Defendant's counsel excepted to the statement, and asked the

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court to instruct the jury to disregard it, but the court did not do so. By the statement of the prosecuting attorney it is clearly implied that the only reason why the defendant was not impeached was because he did not put his own reputation for truth and veracity in issue. Of course such is not the law, and in view of the circumstances of this case the statement was very prejudicial to the rights of the defendant. This court has always adhered to the rule that much latitude must be allowed counsel in making statements during the progress of a trial and in their arguments to the jury, yet where, as here, the liberty of a citizen is involved, and where, as here, that liberty practically depends upon the statements of one witness as against the statements of others, we cannot ignore the question. The statement as disclosed by the bill of exceptions is not denied or even questioned, and 19 hence we must assume it to be true. The only caution that was given to the jury by the court during the trial related to colloquies between counsel, at which time the court told the jury not to pay any attention to what counsel said, but to confine their deliberations to the evidence alone. It is now contended that that caution was sufficient to meet the objection of defendant's counsel. Under the circumstances of this case, however, we are of the opinion that it was not, and that the statement was prejudicial to the substantial rights of the defendant.

There are a number of other assignments argued, but none is sufficient to require special consideration. Neither is it necessary to pass upon the ruling of the court in denying the motion for a new trial upon the ground of newly discovered evidence. Any proper evidence may be introduced if the case is retried.

For the reasons stated, the judgment is reversed, and the cause is remanded to the district court of Beaver county, with directions to grant defendant a new trial.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

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In re Helin's Estate, 55 Utah 572.

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## In re HELIN'S ESTATE.

## Appeal of HANSEN.

No. 3424. Decided March 12, 1920. (188 Pac. 633.)

1. TRIAL—DISCRETIONARY WITH COURT TO GRANT TRIAL BY JURY WHERE ISSUES ARE PURELY EQUITABLE. Where issues to be tried are purely equitable, the question of granting trial by jury is one wholly within the discretion of the court. (Page 574.)
2. EVIDENCE—POSSESSION OF DEED CARRIES PRESUMPTION OF REGULARITY. The possession of deed regular upon its face carries with it the presumption of regularity, even where not filed until after the death of the grantor.<sup>1</sup> (Page 575.)

Appeal from District Court of Salt Lake County, Third District; *Wilson McCarthy*, Judge.

In the matter of the estate of Anna S. Helin, deceased.

Petition by Peter H. Hansen, as administrator, for an order to sell real estate.

From an order denying the petition on protest of Alex F. Jones, the administrator appeals.

ORDER AFFIRMED.

*C. E. Norton*, of Salt Lake City, for appellant.

*Morgan & Huffaker*, of Salt Lake City, for respondent.

GIDEON, J.

In March, 1917, Peter H. Hansen, appellant, was appointed administrator of the estate of Anna S. Helin, deceased, by the district court of Salt Lake county. In May, 1918, the appellant, as administrator, filed a petition for an order to sell

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<sup>1</sup> *Ewing v. Keith*, 16 Utah, 312, 52 Pac. 4; *Wilson v. Cunningham*, 24 Utah, 167, 67 Pac. 118.

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certain real estate described in the petition and claimed to be the property of the estate for the purpose of paying the indebtedness of the estate and expenses of administration. The respondent, Alex F. Jones, filed a protest against the allowance of the petition, in which he claimed to be the owner of the real property, and denied that the estate or the administrator had any interest in or right to said property. It is alleged in the protest that the deceased, on or about the 6th day of November, 1911, was the owner of the property described in the petition; that at such time she had one son, Peter Helin, who was an incompetent; that on or about that date the deceased and the protestant, Jones, entered into a written agreement whereby it was stipulated that, in consideration of the support of herself and her demented son during the remainder of their natural lives, and the further consideration of the payment of \$299, receipt of which was acknowledged, the protestant should receive the property in controversy, and that a deed had been executed by the deceased, conveying the property to the protestant Jones. It is also stated in the protest that the agreement provided that the deed to the property should be left in escrow until the death of the said Anna S. Helin, at which time it should be delivered to Jones. It is further stated that in compliance with that agreement he, Jones, supported the deceased, provided her with a home, the necessities of life, clothing, etc., during her lifetime, and at her death paid the funeral expenses and the expenses of her last illness. Furthermore, that he had, from the date of the contract, supported her son, and was continuing to and was furnishing him with all of the conveniences and necessities of life. The protest recited, in addition, that the contract had been, shortly after the date of its execution, recorded in the county recorder's office in Salt Lake county, and that protestant had been in possession of said property since the date of the contract, had made valuable improvements thereon, and that he claimed to be and was the owner and entitled to possession thereof. It appears that a deed was executed by the deceased, conveying the property to the respondent, and shortly after her death was recorded in the

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recorder's office of said county. In the reply filed by the administrator it is admitted that the contract and deed had been executed and recorded. The reply alleges, however, that at the date of the execution of the contract the said Anna S. Helin, by reason of old age, mental and physical weakness, and her inability to read or write any language, was incapacitated from transacting any business; that at said time the respondent, Jones, fraudulently took advantage of her mental and physical weakness, and secured the execution of the contract; that there was no consideration for said contract or deed; and that Jones had paid no part of the consideration mentioned in the contract. The administrator in the reply further alleges that the protestant signed the name of the deceased to the agreement; that the deed was never delivered by the grantor to any person; that it was kept by the deceased during the remainder of her life; that it was taken surreptitiously after her death, and recorded by the protestant, Jones.

The court, in July, 1919, denied the petition for sale of the real property. The court was, however, of the opinion that the protest on the part of Jones and the reply by the administrator were sufficient to present the question whether the title to the property held by Jones had been procured or obtained by fraudulent or unfair means; that the court could and should therefore determine the issues thus presented, and ascertain what interest, if any, the estate had in this particular property, and for those reasons made an order that a hearing on said issues be transferred to the equity calendar of the district court. The administrator, it seems, filed a written demand for a jury to try such issues. However, no jury fee accompanied such demand, and consequently no 1 jury was in attendance upon the court. The issues, if any issues were presented, were purely equitable, and the question of granting a trial by jury was one wholly within the discretion of the court.

One Mary C. Hansen held a judgment against the deceased, and that judgment had been presented to the administrator, as a claim against the estate, and allowed for an amount in

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excess of \$400. The claimant was the wife of the administrator. It is apparent that it was the desire of the court to ascertain the facts and definitely determine whether or not the estate had any interest in this property, and, if so, to direct the sale of such interest and apply the proceeds to the payment of this judgment.

In October, 1919, the cause came on for hearing. The court definitely announced to counsel that the only question at issue, and the only one to be adjudicated at that time, was the title to the property, and declared that, no matter what the pleadings might be designated, they, nevertheless, presented a cause of action, and a liberal construction would be given to the pleadings to determine that issue. The court, at the same time, stated to counsel that the reply on the part of the administrator would be considered in the nature of a complaint, asking relief in the way of having the property declared part of the assets of the estate, or, at least, to determine what interest, if any, the estate had in such property; that the protest on the part of the respondent would be considered in the nature of an answer to the complaint. During the hearing, in an effort to ascertain the administrator's theory of the proceedings, the court addressed this remark to his counsel:

"Just what are you going to try to allege here? I would like to give you all the leeway that the court can; I would like to do justice between the parties. Are you going to try to prove that this deed was a mortgage and set it aside?"

Counsel answered:

"Not yet. Not going to set it aside; no, sir. We are not going to try to set it aside."

The court, doubtless at a loss to understand counsel's theory of the proceedings, permitted him to introduce all the testimony offered by him.

There was, however, a total absence of proof which, considered most favorably to the administrator, would in any way tend to impeach the contract or the deed.

Counsel for the administrator seemed to be of the opinion that, the estate having claimed the property (notwithstanding the respondent was in possession and held a      2

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deed to the property regular upon its face), it was incumbent upon the respondent to prove that he was a bona fide purchaser, and that until he had so done the administrator was entitled to have some decree adjudging the estate to be the owner. It needs no authority to prove that such a position is untenable. The possession of respondent under a deed regular upon its face carries with it the presumption of regularity. If the administrator desired to have the deed set aside or possession disturbed, the burden was upon him to allege and prove that the deed was obtained and possession taken by fraud or other unfair means. *Ewing v. Keith*, 16 Utah, 312, 52 Pac. 4; *Wilson v. Cunningham*, 24 Utah, 167, 67 Pac. 118.

We remark in closing this opinion that the district court exercised a great deal of patience, and seems to have been extremely liberal in its efforts to enable the administrator to present any testimony which would enlighten the court upon the real situation existing at the date of the execution of the contract and the deed, and to establish any fact showing that the estate had any interest in the property, but, for some reason not apparent, counsel for the administrator seems to have been determined that he would produce no such testimony. The court, as a consequence, could grant him no relief. At the close of the testimony offered by the administrator the court did the only thing it could do, namely, enter an order dismissing the petition. It necessarily follows that the order or judgment should be affirmed.

It is probably unnecessary to add, but, in view of the admitted incompetency of the son of the deceased, it may not be amiss to say, that the judgment of the district court, dismissing the petition of the administrator or the affirmance of that order by this court, does in no way affect or determine the limitations contained in the contract upon respondent Jones' possession or ownership of this property. His right to incur it or alienate it during the life of Peter Helin of necessity must be controlled and governed by the provisions of the contract made with the deceased.

It appears from the record that there is no property in the



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Appeal from First District.

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estate from which the costs of this appeal can be paid. We have therefore concluded to allow neither party costs. The order of the district court is affirmed.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

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HANSEN v. OREGON SHORT LINE R. CO.

No. 3414. Decided March 17, 1920. (188 Pac. 852.)

1. **APPEAL AND ERROR—ASSIGNMENTS WAIVED BY FAILURE TO ARGUE.** An assignment not argued either orally or in brief is abandoned. (Page 580.)
2. **TRIAL—MOTION FOR DIRECTED VERDICT MUST SPECIFY INSUFFICIENCY OF EVIDENCE.** Where defendant's motion for directed verdict was wholly general and did not specify wherein the evidence was insufficient, the overruling of the same could not place the trial court in error.<sup>1</sup> (Page 580.)
3. **TRIAL—RULE AS TO POINTING OUT INSUFFICIENCY OF THE EVIDENCE DISTINGUISHED FROM REQUIREMENT ON MOTION FOR DIRECTED VERDICT.** Court rule 26 (54 Utah, xv, 97 Pac. x), providing that, when the alleged error is on the ground of the insufficiency of the evidence to sustain or justify the verdict, the particulars shall be specified, is applicable to the Appellate Court, and has no application to the rule of practice requiring party moving for directed verdict to point out the insufficiency of the evidence. (Page 581.)
4. **APPEAL AND ERROR—WHERE PORTION OF INSTRUCTION GOOD, EXCEPTION TO WHOLE CANNOT BE SUSTAINED.** Where an exception was taken to an instruction as a whole, such exception cannot be sustained on appeal if any part of the instruction is good.<sup>2</sup> (Page 582.)

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<sup>1</sup> *Smalley v. Railroad Co.*, 34 Utah, 423, 98 Pac. 311.

<sup>2</sup> *Farnsworth v. U. P. Coal Co.*, 32 Utah, 112, 89 Pac. 74; *Pool v. So. Pacific*, 20 Utah, 210, 58 Pac. 326; *Wall v. Niagara M. & S. Co.*, 20 Utah, 474, 59 Pac. 399; *Nebeker v. Harvey*, 21 Utah, 363, 60 Pac. 1029; *Pennington v. Redman V. & S. Co.*, 34 Utah, 223, 97 Pac. 115; *Ryan v. Curlew Irr. Co.*, 36 Utah, 382, 104 Pac. 218; *Grow v. Utah L. & R. Co.*, 37 Utah, 41, 106 Pac. 514.

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Hansen v. Oregon Short Line R. Co., 55 Utah 577.

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5. **CARRIERS—CARRIER OWES SAME DUTY TO GRATUITOUS PASSENGER AS OTHERS.** A carrier owes the same duty to a gratuitous passenger riding on a pass as to others. (Page 582.)
6. **APPEAL AND ERROR—ASSIGNMENT MUST POINT OUT INSUFFICIENCY OF EVIDENCE.** Under court rule 26 (54 Utah, xv, 97 Pac. x), which contains the same requirement as Comp. Laws 1917, section 6967, but allows appellants to make specification of the insufficiency of evidence in the assignment of error instead of the bill of exceptions, an assignment complaining that the court erred in refusing a requested instruction that the evidence was insufficient to support a verdict for defendant cannot be considered, where the insufficiency of the evidence was not pointed out.<sup>3</sup> (Page 583.)
7. **CARRIERS—PERSONS AT STATION ABOUT TRAIN TIME INTENDING TO TAKE PASSAGE ARE "PASSENGERS."** Where plaintiff called at railroad company's station about noon expecting a pass, and, being informed that the pass had not arrived, but would arrive by mail on the noon train, repaired to a nearby town and obtained the pass, returning to the station before the train was due, and, though the night was cold, and it was customary to keep open the waiting room on cold nights, and the agent knew that plaintiff would return and heard him outside, was refused admission, plaintiff must be deemed a "passenger" and entitled to recover for injury from exposure; for the relation of passenger and carrier begins as soon as one intending in good faith to become a passenger enters in a lawful manner upon the carrier's premises for that purpose. (Page 587.)

Appeal from District Court, First District, Cache County;  
*J. D. Call*, Judge.

Action by Martin Hansen against the Oregon Short Line Railroad Company.

Judgment for plaintiff, and defendant appeals.

**AFFIRMED.**

*Geo. H. Smith, J. V. Lyle, and Chris Diehl*, all of Salt Lake City, for appellant.

<sup>3</sup> *Egelund v. Fayter*, 51 Utah, 579, 172 Pac. 313; *Holt v. Great Eastern Casualty Co.*, 53 Utah, 543, 173 Pac. 1168.

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*J. W. Gardner*, of Logan, for respondent.

THURMAN, J.

Plaintiff's amended complaint in substance alleges the capacity and business of defendant as a railroad company and that it had a railroad station, track and yard at Cornish, Utah; that on or about the 2d day of November, 1902, plaintiff went to said station with the intent and purpose of engaging and taking passage from said station to Lima, Mont; that the train was advertised to depart from said station at 1:30 o'clock a. m., and that said plaintiff arrived at the station at the time advertised for the said train's departure; that the train was about three hours late, and the night was cold, dark, and stormy; that defendant, in violation of its duty, failed to use ordinary care and diligence to make, promulgate, and enforce any rule for the protection of its passengers, and failed and neglected to have said station open, lighted, or warmed, and plaintiff was obliged to remain on the platform, without shelter, in the cold, wet, and storm for the space of about three hours, by reason of which neglect and exposure plaintiff took a severe cold and contracted the disease commonly called asthma, from which he has never recovered; that he is permanently injured, and from the disease so contracted has suffered and still suffers great physical and mental pain; that since said November 2, 1902, to the present time, he has been sick and constantly under the care of physicians and has been wholly unable to perform any labor or attend to the transaction or the performance of his usual and necessary business, whereby plaintiff has been and is greatly damaged in the sum of \$12,000, for which sum he prays judgment.

The defendant, answering, admits its capacity and business as a railroad company, and that it has a station called Cornish, at which the transaction attempted to be alleged in the complaint occurred, but alleges that said station is in the state of Idaho. Defendant denies the remaining allegations of the complaint, and in substance affirmatively alleges that the injury, if any, of which the plaintiff complains, and the dam-

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ages sustained by him, if any, were caused by his own negligence, and were not caused, nor the cause thereof contributed to, by the negligence of defendant.

The cause was tried to a jury, which rendered a verdict in favor of plaintiff, and judgment was entered thereon. This appeal is taken from the judgment so rendered, and appellant assigns as error: (1) The admission of certain testimony over its objection; (2) the overruling of its motion for a directed verdict; (3) the giving of certain instructions excepted to by it; and (4) the refusal of the court to instruct the jury, as requested by it, to return a verdict of no cause of action.

Appellant, by failing to argue either orally or in its brief, abandons its first assignment of error. 1

By the second assignment appellant charges error in overruling its motion for a directed verdict.

At the conclusion of the evidence defendant moved for a directed verdict on the following grounds:

"First, that there is no disputed question of fact to be submitted to the jury; second, that there is no evidence to warrant a verdict against the defendant; third, that the court would be bound to set aside a verdict if one were rendered against the defendant; fourth, that the evidence is insufficient to support a verdict in favor of the plaintiff."

The motion nowhere specified the particular grounds upon which the defendant relied. It failed to point out or call to the attention of the court or opposing counsel the particulars wherein the evidence was insufficient so as to enable them to understand the points relied on. No opportunity was afforded plaintiff by the motion to supply any defect in his evidence, because no such defect was called to his attention. Under the decisions of this court, the trial court was not chargeable with error in overruling the motion. *Smalley v. Railroad Co.*, 34 Utah, 423, 98 Pac. 311. In that case the trial court granted a motion for directed verdict, and because of the particular circumstances attending the case this court on appeal sustained the ruling and affirmed the judgment. In an able and lucid opinion by Hon. D. N. Straup, then a member of this court, the question is elaborately 2

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discussed, and the decisions of the court in other cases are referred to. In the light of these authorities, which are well considered, we are of the opinion that the trial court committed no error in overruling the motion for a directed verdict.

Respondent, in discussing the assignment just considered objects to our right to review the evidence, and relies on rule 26, 54 Utah XV, 97 Pac. x, of the practice of this court, which requires an appellant in certain cases to specify the particulars wherein the evidence is insufficient. It should be understood once for all that rule 26, in the particular mentioned, has no application whatever to a motion for a directed verdict. If the motion for a directed verdict, 3 where insufficiency of the evidence is relied on, fails to specify the particulars wherein the evidence is insufficient, the trial court is justified in denying the motion, and even if appellant should afterwards on appeal, in his assignment of errors, specify the particulars wherein the evidence is insufficient, such specification, as far as the motion is concerned, would be of no avail. That rule of practice is entirely independent of the requirements of rule 26, as will more fully appear upon an examination of the opinion in the Smalley Case, *supra*, and the cases therein cited.

Passing for the present appellant's third assignment, we will next consider assignment No. 4. Appellant contends that the court erred in its instruction No. 10, which reads as follows:

"There is no difference in the degree of care required of carriers, nor in the measure of liability in the transportation of passengers for hire and gratuitous passengers or those who may be riding upon a pass, nor is it necessary for one to be in the carrier's train or be traveling thereon to constitute one a passenger, but one is as much a passenger, entitled to all the care, protection, accommodations, and privileges of a passenger, while he is waiting at the carrier's station, at a reasonable time before the time for departure of the train, ready and with the intention to take passage thereon in due course."

The exception was taken to the instruction as a whole. It is a rule too well established to be the subject of controversy

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that such an exception cannot be sustained if any part of the instruction is good. Counsel for respondent in support of this rule calls our attention to the following cases: *Farnsworth v. U. P. Coal Co.*, 32 Utah, 112, 89 Pac. 74; *Pool v. So. Pacific*, 20 Utah, 210, 58 Pac. 326; *Wall v. Niagara M. & S. Co.*, 20 Utah, 474, 59 Pac. 399; *Nebeker v. Harvey*, 21 Utah, 363, 60 Pac. 1029; *Pennington v. Redman V. & S. Co.*, 34 Utah, 223, 97 Pac. 115; *Ryan v. Curlew Irr. Co.*, 36 Utah, 382, 104 Pac. 218; *Grow v. Utah L. & R. Co.*, 37 Utah, 41, 106 Pac. 514. There are later decisions of this court to the same effect, but, as the rule is not in dispute, additional cases need not be cited. The question then is: Is the instruction divisible into integral parts, each of which, when considered separately, is bad in law, or is one or more of the integral parts unexceptionable? If the former, the instruction is bad as a whole and the exception is well taken; if the latter, the exception cannot prevail even though the instruction is objectionable in one or more of its integral parts. This calls for analysis. Respondent contends that the first part of the instruction, down to the word "pass," is severable from the remainder and constitutes a distinct rule of law. It reads:

"There is no difference in the degree of care required of carriers nor in the measure of liability in the transportation of passengers for hire and gratuitous passengers or those who may be riding upon a pass."

This clause, considered by itself, undoubtedly states a correct rule of law. 2 Moore on Carriers (2d Ed.) pages 1030-1036; 2 Hutchinson, Carriers (3d Ed.) page 1178; 2 Michie, Carriers, page 1564 et seq. It would serve no useful purpose to review the remaining parts of the instruction. Appellant's exception to instruction No. 10 is not well taken.

In its assignment No. 5 appellant contends that the court erred in refusing to give its requested instruction No. 15, which reads:

"You are instructed that the evidence in this case is insufficient to support a verdict against the defendant, and you are therefore instructed to return a verdict of no cause of action."

Again we are confronted with the proposition that there was no specification of particulars wherein the evidence is

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insufficient. Whether the alleged insufficiency relates to the relation of plaintiff to the defendant, the character and extent of plaintiff's injury, or whether he was injured at all, or whether the defendant was negligent, and, if negligent, whether the negligence was the proximate cause of the injury, or whether the plaintiff was guilty of contributory negligence, neither the respondent nor the members of this court are in any manner informed or enlightened by the assignment of errors or by any specification elsewhere found in the record. We have already referred to the fact that the motion for a directed verdict was insufficient in not stating the particular grounds of the motion, not because of rule 26 and the practice of this court, but because the decisions of the court have been uniform in requiring it. We are now confronted with a different situation—a situation to which rule 26 is especially applicable. That rule, among other things, provides:

"When the alleged error is upon the ground of the insufficiency of the evidence to sustain or justify the verdict or decision, the particulars wherein the evidence is so insufficient shall be specified."

There can be no denial of the proposition that in the present case that provision of the rule has been entirely disregarded. The rule in question is not a mere rule of 6 convenience originating entirely in the mind of the court; it is a rule based upon a positive statute which has never been repealed. Comp. Laws Utah 1917, section 6967, makes substantially the same requirement. That statute contemplates that the specification shall be made in the bill of exceptions, but, as it was considered more convenient to litigants to permit them to make their assignment of errors and specifications of particulars after appeal was taken, rule 26 was adopted, and in effect accomplishes all that the statute requires. This question was considered at length in a recent decision of this court in which all of the previous cases and statutes bearing upon the question are referred to. *Egelund v. Fayter*, 51 Utah 579, 172 Pac. 313. See, also, *Holt v. Great Eastern Casualty Co.*, 53 Utah 543, 173 Pac. 1168.

As this question was carefully considered by the court in the cases referred to and the cases cited in the opinions, we deem it unnecessary to prolong the discussion.

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In view of the decisions of this court to which we have referred, we do not feel authorized to review the evidence in this case for the purpose of determining whether or not the trial court erred in denying defendant's request for a peremptory instruction. In view, however, of appellant's assignment No. 3, which we have purposely deferred considering until the other assignments were disposed of, we deem it our duty to review the evidence in part at least for the purpose of determining whether or not the plaintiff, in the transaction of which he complains, was a passenger on defendant's railroad as a matter of law. This is rendered necessary by appellant's exception referred to in assignment No. 3.

In assignment No. 3 appellant excepted to the following words in the court's instruction No. 9:

"\* \* \* In this connection you are instructed that it is the duty of the railroad company to protect its passengers from injury and to provide reasonably safe means for their comfort and accommodation and use due care for their protection and safety, while waiting at its station for trains, and the same rule applies both at stations where they are termed 'flag stops' or 'regular stops.'"

There is no instruction defining what in law constitutes a passenger on a railroad, nor was there any request for such instruction. The language complained of assumes or takes it for granted that plaintiff was a passenger and instructs the jury upon that assumption as to its duty in such cases. As it is not admitted in the pleadings or elsewhere by the defendant that plaintiff was a passenger, in order to sustain the instruction, or the language to which exception is taken, it is necessary to find as a matter of law that plaintiff was in fact a passenger. This, because of the court's assumption, must appear from the undisputed evidence in the case.

The undisputed evidence shows that plaintiff and his son arrived at appellant's railroad station at Cornish about noon on or about the 31st day of October, 1902, for the purpose of taking passage on the train at that point for Lima, Mont. They were expecting passes for their transportation, but when they arrived at Cornish the passes were not there. They had the agent at that station telegraph for their passes, and through him received answer by telegram that the passes



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would arrive by mail on the noon train of that day. The post office was at the town of Weston, a distance of three or four miles from the station. After making some inquiry of the agent as to when the next train for Lima would arrive at Cornish, they left their baggage on the platform of the station depot and walked to Weston. There is some confusion in the testimony as to whether plaintiff inquired for the time of the "next train" or of the "night train" to Lima, but this, in our opinion, is immaterial. It is quite conclusive it was the night train he inquired, for, after being informed that the passes would arrive on the noon train, the schedule time of which was 1:28 p. m., the plaintiff could not have contemplated going to Weston for his passes and returning to catch the 1:28 p. m. train. Indeed, if we understand the record, that was the train upon which his passes would arrive. The mail would then be carried to the post office at Weston, at which point he would receive the passes. In any event it is conclusively shown that the schedule time of the night train at Cornish was 2:45 a. m. The plaintiff, because of the confusion as to the time of the train above referred to, arrived at the station from Weston at about 12:30 a. m., some two hours before the train was due, and the train happened to be nearly an hour behind its schedule time. The evidence shows that the night was cold and stormy. It also shows that when plaintiff was at the station at noon he asked the agent if the station would be open at night, and the agent answered it would. When plaintiff and his son arrived at the station from Weston that night, they found the door of the waiting room locked or fastened so that they were not able to enter. They knocked and kicked the door. The agent, who was in the station, in fact, living there, told them to keep still, or words to that effect, but did not open the door. The plaintiff and his son continued at the station, walking or running back and forth on the platform outside to keep warm, until the train arrived, which was some time between 3 and 4 o'clock. The evidence is conclusive that, while the station was one that was not kept open all night during the summer months, yet it was the custom to keep it open during cold and stormy weather

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even during the summer months, and to keep it open all the time between about the middle of October and the month of May next succeeding. The station agent and his wife both testified concerning this custom; in fact, the agent testified that it was in pursuance of instructions received by him from the defendant company. Neither the agent nor his wife seemed to remember anything concerning the plaintiff or the transaction above referred to.

It should be understood that, while the transaction occurred on or about the 1st of November, 1902, and the action commenced in 1904, the trial of the case, for some reason unexplained, did not take place until the month of April, 1919. This, no doubt, accounts for their failing to remember anything concerning the transaction.

Upon this state of facts the question is: Was the plaintiff a passenger on defendant's railroad in contemplation of law?

In 6 Cyc. p. 536, it is said:

"The relation of carrier and passenger commences when a person with the good-faith intention of taking passage, and with the express or implied consent of the carrier, places himself in a situation to avail himself of the facilities for transportation which the carrier offers. In case of a railroad this relation arises not merely when the passenger enters the train with the ticket already purchased, giving him a contract right to ride, but when he enters upon the premises of the carrier, with intention to take a train in due course."

In 2 Moore on Carriers (2d Ed.) at page 978, the author states the rule in the following language:

"As a general rule, the relationship of passenger and carrier begins as soon as one, intending in good faith to become a passenger, enters in a lawful manner upon the carrier's premises for that purpose, and the carrier's responsibilities date from that time. Ordinarily a person coming to a railroad station with the intention of taking the next train is, in contemplation of law, a passenger, provided his coming is within a reasonable time before the schedule time for the departure of the train."

In 2 Michie on Carriers (2d Ed.) at page 1509, the author says:

"The general rule seems to be that one is entitled to the care and protection due a passenger while he is upon the carrier's station

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grounds for the purpose of taking a train which should depart for his proposed destination within a reasonable time."

2 Hutchinson on Carriers (3d Ed.) at page 1160, states the rule as follows:

"The general rule is that, where a person, with the bona fide intention of taking passage upon a train, goes to the station within a reasonable time prior to the hour of departure of the train, and there, either by the purchase of a ticket or in some other manner, indicates to the carrier his intention to take passage, from that time on while waiting for the train he is entitled to all the rights and privileges of a passenger."

These are standard authorities on the law of carriers. The excerpts above quoted appear to be well supported by a large number of cases cited in the notes thereto.

See, also, 10 C. J. 921, 922, and *Barnett v. Minn. & St. P. Ry. Co.*, 123 Minn. 153, 143 N. W. 263, 48 L. R. A. (N. S.) 262.

In our opinion the language above quoted from the authorities cited correctly reflects the law applicable to the case at bar.

It was during the period of three hours waiting that plaintiff alleges he caught cold and contracted the disease or injury of which he complains. Concerning this, however, we make no comment for the reasons heretofore stated. Neither can we consider the questions of negligence, contributory negligence, proximate cause, or the question of damages. The sole purpose of reviewing the evidence at all is to demonstrate whether or not, in contemplation of law, plaintiff was a passenger on defendant's railroad. Without further comment, it is the opinion of the court that the acts and conduct of plaintiff, the material features of which must have been known to the agent, brought plaintiff within the principles of law above set forth, and that he thereby became, and was to all intents and purposes, a passenger on defendant's railroad.

This disposes of all the assignments of error.

The judgment of the trial court is affirmed at appellant's costs.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

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## FISHER v. BONNEVILLE HOTEL CO.

No. 3417. Decided March 17, 1920. (188 Pac. 856.)

1. EXCEPTIONS, BILL OF—DOCUMENTS SHOULD NOT BE ATTACHED TO BILL AFTER PREPARATION. Documents purporting to extend the time to prepare and serve a bill of exceptions should not be attached to the bill after it has been prepared and presented for settlement. (Page 590.)
2. EXCEPTIONS, BILL OF—TIME FOR FILING WHERE NO NOTICE OF ENTRY OF JUDGMENT GIVEN STATED. Where no notice in writing of the entry of judgment was served on defendant, defendant would have the whole of the six months period allowed for appeal, and perhaps longer under certain conditions, in which to prepare the bill of exceptions and procure settlement thereof, in view of Comp. Laws 1917, section 6969.<sup>1</sup> (Page 591.)
3. APPEAL AND ERROR—BILL OF EXCEPTIONS MUST SHOW SERVICE OF ENTRY OF JUDGMENT. Where the bill of exceptions did not show service of notice of entry of judgment, the bill, which was prepared and presented for settlement within the six months period, will be deemed to have been presented in time, notwithstanding a document purporting to be a notice of entry of judgment, served on defendant appellant, appeared in the transcript sent up by the clerk of the district court, for as the bill of exceptions showed no service, Comp. Laws, 1917, section 6969, requiring the bill of exceptions to be prepared and served within thirty days after services of notice of judgment, has no application. (Page 591.)
4. INNKEEPERS—LIABILITY OF INNKEEPER AND BOARDING HOUSE KEEPER CONTRASTED. An innkeeper is an insurer of property committed to his care by a guest and is responsible for its loss, unless loss is caused by the act of God, the public enemy, or negligence of the guest himself; but, where the relation between the parties is that of boarder and boarding house keeper, the boarding house keeper is liable only for loss for failure to exercise ordinary care.<sup>2</sup> (Page 593.)
5. INNKEEPERS—WHO ARE "GUESTS" AT INN. Any one away from home receiving accommodations at an inn as a traveler is a "guest," entitled to hold the innkeeper responsible as such; hence the wife of a legislator, who had come to the capital city of the state during the session, is a guest in a hotel in which she and her husband were residing during his stay as a legis-

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<sup>1</sup> *Wilson v. Salt Lake City*, 52 Utah, 506, 174 Pac. 851.

<sup>2</sup> *Lawrence et al. v. Howard*, 1 Utah, 142.

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lator, even though the room was rented by the month (citing Words and Phrases, Guest). (Page 595.)

6. INNKEEPERS—WIFE OF GUEST DEEMED GUEST, THOUGH SHE DID NOT REGISTER OR PAY FOR LODGING. Though the wife of a guest at a hotel, who rented a room by the month during his temporary stay in the city, did not register and paid no consideration, she is nevertheless a guest in the hotel, and entitled to protection as such, and the hotel is liable for loss of her baggage delivered to the hotel porter. (Page 595.)

Appeal from District Court, Salt Lake County, Third District; *P. C. Evans*, Judge.

Action by Annie M. Fisher against the Bonneville Hotel Company.

From a judgment for plaintiff, defendant appeals.

**AFFIRMED.**

*Gustin, Gillette & Brayton*, of Salt Lake City, for appellant.

*H. L. Mulliner*, of Salt Lake City, for respondent.

THURMAN, J.

Plaintiff alleges in her complaint the corporate existence of defendant and that it was the keeper of an inn or hotel in Salt Lake City known as the "Newhouse Hotel"; that on the 20th day of January, 1917, after plaintiff had been received by defendant as a guest in said hotel, plaintiff delivered to and left in the custody of said defendant her baggage, consisting of a leather grip, containing wearing apparel, toilet articles, and other personal property, all of the reasonable value of \$204.75; that after defendant had taken possession of said baggage and property, and assumed the relation of hotel keeper thereto, said defendant negligently failed to care for the same, so that it became wholly lost to the plaintiff, to her damage in the sum heretofore mentioned.

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Defendant, answering, admits that at the time mentioned in the complaint it was a corporation, and keeper of the inn or hotel described in the complaint. It denies both specifically and generally all the remaining allegations thereof.

The cause was tried to the court without a jury, findings were rendered in favor of the plaintiff, judgment was entered thereon, from which judgment defendant appeals, and assigns numerous errors in the findings of the court.

Before considering the alleged errors of the court, it becomes our duty to dispose of a motion made by respondent to strike the bill of exceptions. The motion is voluminous, and calls attention to numerous apparent irregularities in the document filed as a bill of exceptions. Various documents purporting to be orders extending time to prepare and serve the bill are challenged by respondent and their authenticity disputed. All of the alleged orders covered by the motion appear to have been procured and attached to the bill after it had been prepared and served, and even after 1 it had been returned to appellant and presented to the court for settlement. This, of course, is an irregularity, and it is difficult to understand just how it could have occurred. The explanation made by appellant's counsel, however, tends to show good faith on their part in attaching the documents to the bill, so that no intentional wrong may be imputed to them in respect to the matter which constitutes the basis of the motion to strike.

As we view the question, the documents objected to are wholly immaterial, and need not have been attached to the bill at all. The record shows that judgment was entered and filed May 15, 1919. Defendant's time within which to appeal would not expire until November 15th of the same year, and if no notice in writing of the entry of judgment was served upon the defendant at all, it would have the whole six months, and perhaps longer under certain conditions, in which to prepare and serve its bill of exceptions and procure a settlement thereof. See *Wilson v. Salt Lake City*, 52 Utah 506, 174 Pac. at page 851. Of course defendant was required to file and serve its notice of appeal within six months from the entry

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of the judgment, whether notice of the entry was served or not; there being in this case no stay of judgment by motion for a new trial or other proceeding. The record shows that notice of appeal was filed and served on the 11th day of November, 1919, and was therefore in time. It further shows that the bill of exceptions was settled on the same day by the judge who tried the case, which was also in time if no notice in writing of the entry of judgment was served upon appellant.

Comp. Laws Utah, 1917, section 6969, among other things, provides that a bill of exceptions may be prepared and served within thirty days after notice of the entry of judgment when the case is tried without a jury.

The controlling question in this proceeding is, was there notice of the entry of judgment served upon appellant at any time? If so it should appear in the bill of exceptions. It could not appear in the judgment roll. There is no notice of entry in the bill of exceptions. A document purporting to be a notice of entry of judgment served upon appellant appears in the transcript sent up by the clerk of the district court, but we have no power to give it effect in determining the question. It is pertinent to remark that if this document, which on its face indicates that it was served on appellant the next day after the judgment was entered, had been incorporated in the bill of exceptions, respondent's motion to strike would of necessity prevail, because the purported orders to extend the time in which to prepare and serve the bill were wholly insufficient. Our conclusion, therefore, is that the orders objected to were immaterial, and appellant's proposed bill of exceptions was served in time. The motion to strike the bill is denied. 2, 3

The principal and controlling question presented by appellant in its assignment of errors is the relationship existing between the plaintiff and defendant at the time of the transaction complained of. Plaintiff contends she was a guest of the hotel, while defendant insists she was not. This involves a consideration of all the evidence bearing upon that question.

There is substantial evidence in the record to show that early in January, 1917, plaintiff's husband, a member of the

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Utah Legislature of that year, came from his home in Heber City, Wasatch county, Utah, and went to defendant's hotel, known as the Newhouse Hotel, in Salt Lake City, and there made arrangements for a room for himself and plaintiff; that the price arranged for was so much per month during the time that they might remain; that plaintiff came two or three days after her husband made the arrangements, and from thence on they occupied the room. It does not appear that plaintiff registered, or that her name appears on the register of the hotel; but she was there occupying the room with her husband. One or two of their children came down from Heber and occupied the room with their parents a portion of the time while they were there. It also appears that on or about the 20th of January, 1917, and during their occupancy of the room, plaintiff and her husband made a trip of one day to Provo, Utah; that as plaintiff was leaving her room, carrying her grip or suitcase in her hand, one of the porters of the hotel offered his services in carrying the grip; that plaintiff stated she could carry the grip herself, but the porter insisted on carrying it and took the grip; that the porter did not get on the elevator with the plaintiff in going down to the lobby; that plaintiff's husband told the bell boy to tell the porter when he came to put the grip with the other grips, and showed the bell boy where they were; that plaintiff and her husband then went out to breakfast, after which plaintiff waited on the corner while her husband and another gentleman went for the grips; that when they returned, and while on the street car, plaintiff called her husband's attention to the fact that he had left her grip; that they went on to the railroad depot, and there her husband telephoned to the hotel and was answered by one of the porters; that he informed the porter that he had left plaintiff's grip, and after some inquiry or investigation by the porter he informed plaintiff's husband that the grip was there, and promised to take care of it until plaintiff and her husband returned from Provo; that they did return that evening, but upon investigation were unable to find the grip; that considerable investigation was made by the manager of the hotel, the porters were examined, and the man-



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ager informed the porters that they had been careless, and promised plaintiff's husband that the matter would be fixed up if the grip could not be found. The grip contained ladies' and children's wearing apparel, toilet articles, etc., found by the court to be of the value of \$171.75. There is more or less conflict in the evidence, but it would be useless to review the same, for, as stated in the beginning, there is substantial evidence to the effect above stated.

It is contended by appellant that plaintiff was not, in law, a guest of the hotel; that, if she occupied any relation at all to the hotel, it was as a boarder, and not as a 4 guest. As to the responsibility of a hotel keeper for the loss of property of one patronizing the hotel, much depends upon the question whether the patron is a boarder or a guest. If a guest, the hotel keeper becomes an insurer of the property committed to his care, and is responsible for its loss, unless the loss is caused by the act of God, the public enemy or the negligence of the owner himself. If the patron is a boarder, the hotel keeper is not responsible except in case of his failure to use ordinary care. *Lawrence et al. v. Howard*, 1 Utah, 142, and cases hereafter cited.

In the case at bar the court found that the property was lost through the negligence and carelessness of the defendant company. So that, even if plaintiff was only a boarder in the sense that that term is used in the law, still the hotel company owed her the duty of using ordinary care in respect to the property left in its charge. The evidence, as we have shown, discloses the fact that plaintiff handed the grip to one of the porters of the hotel, at his request, and upon his offer of assistance, when she was leaving her room. That is the last she ever saw of the grip, and when the whole story was laid before the hotel manager he charged the porters, in the presence of each other, with being careless in respect to the property. Certainly this court, in view of such evidence, cannot find that the evidence was insufficient to support the finding.

Defendant makes the positive admission in its assignment No. 6 that the evidence shows that plaintiff was a boarder of the defendant company. With this admission there is perhaps

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no real necessity for prolonging the discussion, for we have already held that the evidence is sufficient to sustain the judgment, even if plaintiff was only a boarder. But defendant brings forth another arrow from its quiver, and in its assignment No. 2 alleges the insufficiency of the evidence to show there was ever any relation of innkeeper or hotel keeper between plaintiff and defendant. Thus, in assignment No. 6, appellant insists that under the evidence plaintiff was a boarder, and not a guest, and in assignment No. 2, with equal assurance, insists that plaintiff was not even a boarder. In view of the celerity with which appellant changes from one position to another, it is difficult for the court to treat the question in a straightforward, logical manner. We have already shown that, even if plaintiff was only a boarder, as admitted by appellant in its assignment No. 6, still the duty devolved upon defendant to exercise ordinary care in respect to her property placed in its custody.

But, if plaintiff was not even a boarder of defendant, the question is: What was her status during the time she was in the hotel? It will be remembered plaintiff's husband went to the hotel early in January, 1917, and engaged a room for himself and plaintiff. The rate was fixed at twenty dollars per month during their stay, which was indefinite. The rate was the same as members of the Legislature were paying at other hotels. The plaintiff's name was not entered upon the hotel register, but the evidence shows that the arrangement for the room was for her, as well as for her husband. They took their meals sometimes at the hotel café and sometimes at other places. The rate for the rooms did not include meals. The hotel was run on the European plan.

"Any one away from home, receiving accommodations at an inn as a traveler, is a guest, and entitled to hold the innkeeper responsible as such."

"While a guest is a traveler, it is not necessary that he should come from another state or county, or from any distant place. Any person going from his own home, whatever the distance may be, and applying for and receiving accommodations at a hotel, is a traveler, and therefore a guest."

"If a person goes to an inn as a wayfarer and a traveler, and the innkeeper receives him as such, he becomes the innkeeper's guest,

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Appeal from Third District.

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and the relation of landlord and guest is instantly established between them. Neither the length of time that a man remains at an inn, nor any agreement he may make as to the price of board per day, deprives him of his character as a traveler and a guest, provided he retains his status of traveler in other respects."

These excerpts are taken from 4 Words and Phrases, at page 3190. We believe they correctly reflect the law as to what constitutes a guest of an inn or hotel. Respondent calls our attention to other cases and authorities, generally to the same effect. Schouler on Bailments, section 231; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; Beale on Innkeepers, sections 111, 113; *Hill v. Memphis Hotel Co.*, 124 Tenn. 376, 136 S. W. 997, 34 L. R. A. (N. S.) 420; *Watt v. Kilbury*, 53 Wash. 446, 102 Pac. 403; *Pettit v. Thomas*, 103 Ark. 593, 148 S. W. 501, 42 L. R. A. (N. S.) 122, Ann. Cas. 1914B, 726; *Moon v. Yarian*, 147 Ill. App. 383. See, also, Wandell on Inns and Boarding Houses, at page 57.

In the light of the authorities referred to, there can be no doubt that plaintiff's husband at least was a guest of defendant's hotel. But it is contended by appellant that, as plaintiff did not register or have any conversation with any of the employes with reference to becoming a guest, or pay any extra compensation for the room, therefore the relation of innkeeper and guest was not established. In the first place, it is in evidence that the arrangement for compensation was for both plaintiff and her husband. Beale on Innkeepers, at section 113, states the rule as follows:

"It is not necessary even that the guest should be personally obliged to pay. If, for instance, a man goes with his family to an inn, each member of the family is a guest, though the head of the family alone is responsible for payment of the innkeeper's charges. And in general every one who is received and entertained as a guest at an inn is a guest, though his bill is paid by another."

This, also must be the law. Under the circumstances detailed in the evidence, if her husband was a guest, his wife, the plaintiff in this action, was also a guest. To 5, 6 hold otherwise would simply be an abortive attempt on our part to convert the law into a patent absurdity and make it appear ridiculous.

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Assuming, then, that under the facts established plaintiff was a guest of the defendant, what was the defendant's liability? Beale on Innkeepers, at section 185, states that in most jurisdictions the liability is analogous to that of common carriers. He then says:

"The rule as commonly stated in these jurisdictions is that the innkeeper is liable for the goods of the guest lost in the inn, unless the loss is the act of God or of a public enemy, or by fault of the owner."

In other words, the innkeeper becomes an insurer of the property against loss. The same author, at section 182, last paragraph, says:

"The innkeeper's responsibility does not depend in any degree upon delivery to him of the goods for which he is held liable. In the earliest case for which he was held answerable for the goods stolen he attempted to avoid liability by pleading that the guest had not delivered the goods to him, but had put them in the chamber; but judgment was given for the guest upon this plea."

Such is the rule at common law. It has not been modified by any statute in this jurisdiction. To the same effect is the note in 8 L. R. A. at page 97, and cases cited; Wandell on Inns, page 91.

On the question of an innkeeper's liability, respondent also cites the following authorities: *Keith v. Atkinson*, a Colorado case, 48 Colo. 480, 111 Pac. 55, 139 Am. St. Rep. 284; 22 Cyc. 1081; *Kaplan v. Titus*, 140 App. Div. 416, 125 N. Y. Supp. 397.

The cases cited by appellant are offered in support of its proposition that plaintiff was a boarder, and not a guest. They are easily distinguishable from the case at bar. It is not necessary to review them, either for the purpose of criticism or comment. The cases relied on are as follows: *Hill v. Memphis Hotel Co.*, 124 Tenn. 376, 136 S.W. 997, 34 L. R. A. (N. S.) 420; *Vance v. Throckmorton*, 68 Ky. (5 Bush) 41, 96 Am. Dec. 327; *Johnson v. Reynolds*, 3 Kan. 255; *Meacham v. Galoway*, 102 Tenn. 415, 52 S. W. 859, 46 L. R. A. 319, 73 Am. St. Rep. 886; *Haff v. Adams*, 6 Ariz. 395, 59 Pac. 111; 22 Cyc. 117.

The court is of the opinion that plaintiff was a guest of de-

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fendant's hotel at the time her grip was lost, and that defendant is liable for the loss. We are also of the opinion that the finding as to the amount of damages is sustained by the evidence.

The judgment of the trial court is affirmed, at appellant's cost.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

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RASMUSSEN v. CALL, District Judge.

No. 3449. Decided March 17, 1920. On Application for Rehearing March 24, 1920. (188 Pac. 275.)

1. **DIVORCE—RIGHT TO DIVORCE ABSOLUTE AND NOT DISCRETIONARY.** The right to divorce when the parties are before the court, the pleadings are sufficient to support a decree, and the degree of proof necessary to convince the court that there are sufficient grounds is present, is absolute, and not discretionary with the court, in view of Comp. Laws 1917, section 2999. (Page 599.)
2. **DIVORCE—DECREE CANNOT BE SET ASIDE WITHOUT NOTICE AND OPPORTUNITY TO BE HEARD.** Comp. Laws 1917, section 3002, providing that a decree of divorce shall become absolute six months after its entry, unless the court for sufficient cause, on its own motion or the application of any party, otherwise orders, does not authorize the court to set aside a decree of divorce granted the wife without notice to her and an opportunity to be heard.<sup>1</sup> (Page 600.)
3. **CONSTITUTIONAL LAW—DUE PROCESS DENIED BY SETTING ASIDE DIVORCE DECREE WITHOUT NOTICE.** To set aside a divorce decree granted the wife without notice and an opportunity to be heard would deny due process of law as the interlocutory decree gave the wife personal and property rights, of which she could be deprived only by due process of law. (Page 600.)

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<sup>1</sup> *Parsons v. Parsons*, 40 Utah, 602, 122 Pac. 907.

Original certiorari proceeding by Inger Marie Rasmussen against *J. D. Call*, as Judge of the District Court of Cache County.

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WRIT ISSUED, AND ORDER ANNULLED.

*Leon Fonnbeck*, of Logan, for plaintiff.

GIDEON, J.

This is an original proceeding in this court, praying for a writ of certiorari directed to Hon. J. D. Call, judge of the district court of Cache county. The purpose of the writ is to review an order of the court setting aside and annulling an interlocutory decree of divorce made by the court on August 29, 1919. The interlocutory decree was entered in an action then pending in said court wherein the plaintiff here was plaintiff and her former husband defendant.

It appears, both from the affidavit filed in this action and the answer of the defendant, that on or about the 18th day of July, 1919, the plaintiff filed in the district court of Cache county a complaint against Charles B. Murray, her husband, praying for a decree of divorce. Summons was served on the defendant, and upon failure to appear his default was regularly entered. Thereafter the court heard testimony in support of the allegations of the complaint, made findings of fact, and entered an interlocutory decree, granting plaintiff a divorce upon the grounds mentioned in her complaint. That decree was made on August 29, 1919. Subsequently, in December, 1919, the defendant Murray was on trial before said court as the defendant in a criminal proceeding, and during his examination he stated that he had never seen the complaint in the divorce proceedings. On the same day Murray stated to the court that he and his wife, plaintiff here, had entered into an agreement, prior to the filing of the divorce action, whereby he had agreed not to appear in that action in consideration of his wife not asking for alimony. It also seems that on this same date Murray stated to the court that the allegations in the complaint in the divorce proceedings were not true. Thereupon the court, it seems, called the attention of the attorney for plaintiff to the information which he had received, and the

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Certiorari. Writ Issued.

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court was advised by the attorney that he knew nothing concerning the facts or the matters which had come to the court's attention. The defendant, on December 6, 1919, without any notice to plaintiff, and without any hearing, made and entered in the divorce action an order which, after stating some preliminary matters of inducement, concludes as follows:

"It is ordered by the court, upon its own motion, that the alleged decree of divorce, together with the findings of fact and the conclusions of law made and entered in said case on the 29th day of August, 1919, be and the same is hereby annulled, vacated, and set aside; the decree to be of no force or effect."

It is the contention of the petitioner, plaintiff, that the court was without authority to make this order; that it had no jurisdiction to make any order affecting her rights under the interlocutory decree, without notice and an opportunity on her part to present proofs to show that no sufficient cause existed authorizing the court to annul or modify the decree of divorce.

The defendant court relies upon section 3002, Comp. Laws Utah 1917, as authority for making the order complained of. That section is as follows:

"The decree of divorce shall become absolute after the expiration of six months from the entry thereof, unless proceedings for a review are pending, or the court before the expiration of said period for sufficient cause, upon its own motion or upon the application of any party, whether interested or not, otherwise orders."

The grounds upon which either party to a marriage contract may be released from the obligations of that contract are enumerated in the statute. The right of divorce is therefore a statutory right. The right of the complaining party to receive from the courts a decree dissolving the bonds of matrimony is not one discretionary with the courts to refuse. Whenever the parties are before the court, and the pleadings are sufficient to support a decree, 1 and the degree of proof necessary to convince the court that there are sufficient grounds named and relied upon is present, such party has an absolute right to a decree. That a divorce may not be granted without proof

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establishing some of the statutory grounds, and that a court may not be imposed upon, it is provided by Comp. Laws Utah 1917, section 2999, that no decree of divorce shall be granted, except upon legal testimony taken in the case before the court, and in all cases the court is required to make and file its findings of fact and decree upon such testimony.

Under section 3000 of the Code, the court may, at the time of making the interlocutory decree, make such orders relating to the children, property, and parties, and the maintenance of the parties and children, as shall be equitable. The force and effect of such a decree on the right of the parties has been discussed by this court in *Parsons v. Parsons*, 40 Utah, 602, 122 Pac. 907. That the decree of August 29, 1919, dissolving the marriage, gave to the plaintiff a real, substantial right, cannot well be questioned. If the allegations of the complaint are true, and the court found such to be the fact in its findings, she was thereby relieved from an intolerable existence. She was released from bearing the name of the man whose treatment rendered her existence little less than that of slavery. The effect of the interlocutory decree being to vest in plaintiff 2 certain personal and property rights, it necessarily follows that the existence of those rights denies to any court the authority or right to take the same from her, except upon legal proceedings in which plaintiff, as the interested party, has an opportunity to be heard in disproof of any attack upon such rights, and to establish the fact that she is justly entitled to the rights sought to be taken from her.

True, in section 3002, *supra*, proceedings to review the decree upon the court's own motion are mentioned; but it was not within the contemplation of the Legislature that sufficient cause could be determined to exist without an opportunity given to the parties interested to be heard in defense of any rights granted by the interlocutory decree. "Sufficient cause" means legal cause. To 3 deprive plaintiff of the rights given her by the interlocutory decree without notice and without opportunity to be heard is not due process of law; in fact, it is without



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any process. *Morris v. Morris*, 60 Mo. App. 86. Moreover, as I understand the decision of this court in *Parsons v. Parsons*, supra, the authority "to review or re-examine the proceedings resulting in the interlocutory decree, except in respect of a disposal of the children or a distribution of the property, without a motion for a new trial, or upon some proceedings known to the code for a review or re-examination of a cause" is not given to the court by section 3002, supra. Be that as it may, the members of this court are all of the same opinion respecting the authority of the defendant to take any action depriving plaintiff of the rights given her by that decree without notice and an opportunity to be heard. The information upon which the court apparently acted was ex parte, and was in no way related to or connected with the action for divorce.

The order of the district court of December 6, 1919, must be held to be a nullity and of no effect. The writ will therefore issue, directing the court to set aside and cancel its order of December 6, 1919. It necessarily follows that the interlocutory decree of August 29, 1919, is, and has been at all times since its entry, in full force and effect.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

ON APPLICATION FOR REHEARING.

GIDEON, J.

The defendant has filed a petition for rehearing. The ground upon which a rehearing is sought is that this court did not determine one of the questions which induced the district court to make the order setting aside the interlocutory decree of divorce.

It is the contention of the defendant, that, where a complaint is filed in an action and a summons is thereafter issued and served, it is not such service as will give the court jurisdiction of the parties, unless a copy of the complaint

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is served or delivered to the defendant with the copy of the summons. It is sufficient answer to that contention to state that no provision is found in the Code containing such requirements. A civil action in this state is commenced by filing a complaint with the clerk of the court in which the action is brought, or by the service of summons. Comp. Laws Utah, 1917, section 6538. In the divorce proceedings a complaint was filed with the clerk of the court on July 18, 1919, and summons was personally served on the defendant the same day. A return was made upon the summons and filed with the clerk on July 25, 1919. The court therefore had jurisdiction of both the subject-matter and the parties to the action. As required by section 6546, a copy of the complaint was deposited with the clerk of the district court at the date of filing the original complaint. There is no provision in the statutes requiring a copy of the complaint to be served with the summons in order to constitute a legal service. Section 6546 directs that at the time of filing the original complaint a copy shall be deposited with the clerk for the defendant in each county in which the summons has been served, unless a copy of the complaint has been served with the summons. That section also provides a penalty for failure to deposit the required copies of the complaint.

"Failure to deposit a copy of the complaint is not jurisdictional, but is a mere irregularity." *Lime & Stone Co. v. Danley et al.*, 38 Utah, 231, 111 Pac. 652.

"The copy of the complaint is not for the court's information or benefit, but for the information and benefit of the defendant." *Reese v. District Court*, 52 Utah, 520, 175 Pac. 602.

It must necessarily follow that failure to serve a copy of the complaint with the summons could in no way defeat or affect the jurisdiction of the court over either the subject-matter or the parties to the action.

Petition denied.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

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Certiorari. Commission's Decision Affirmed.

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STRICKER et al. v. INDUSTRIAL COMMISSION OF  
UTAH et al.

No. 3477. Decided March 18, 1920. (188 Pac. 849.)

1. MASTER AND SERVANT—COMPENSATION ACT DEFINITION ADDS NOTHING TO DEFINITION OF "EMPLOYÉ." Comp. Laws 1917, section 3111, defining an "employé," adds nothing to the generally accepted definition of "employé," which is one who works for and under control of another for hire (citing Words and Phrases, Second Series, Employé). (Page 608.)
2. MASTER AND SERVANT—"INDEPENDENT CONTRACTOR" DEFINED. An "independnt contractor" is one working for another who has no control as to the means by which the work is accomplished; an independent contractor not being subject to control except as to the result of the work (citing Words and Phrases, Second Series, Independent Contractor). (Page 608.)
3. MASTER AND SERVANT—QUARRY WORKMAN HELD TO BE INDEPENDENT CONTRACTOR EXCLUDED FROM COMPENSATION ACT. Where persons engaged by the owner of a quarry to quarry rock at a stipulated price per ton engaged deceased and another to drill the holes, load and shoot the same, deceased and his associate to be paid according to the depth of the holes, deceased must be deemed an independent contractor, and not an employé either of the owner or of the contractors engaged to quarry the rock, it appearing that deceased and his associate were subjected to no supervision, and that the contract with the owner provided that it should not assume any responsibility in connection with the work, and hence there could be no award under the Workmen's Compensation Act either against the independent contractor or the owner for deceased's death; there being nothing to impeach the bona fides of the contracts.<sup>1</sup> (Page 611.)

Application by Ida Stricker and others under Workmen's Compensation Act for compensation for the death of Phillip Stricker against the Amalgamated Sugar Company, employer.

The Industrial Commission denied the compensation, and

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<sup>1</sup> *Callahan v. Salt Lake City*, 41 Utah, 300, 125 Pac. 863; *Dayton v. Free et al.*, 46 Utah, 277, 148 Pac. 408.

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applicants by original proceedings seek annulment of that decision.

DECISION OF THE INDUSTRIAL COMMISSION AFFIRMED.

*Marionaux & Beck*, of Salt Lake City, for plaintiff.

*Dan B. Shields*, Atty. Gen., and *J. H. Wolfe*, *O. C. Dalby*, and *H. Van Dam, Jr.*, Asst. Attys. Gen., for defendant.

WEBER, J.

On October 10, 1917, while working in a limestone quarry owned by the Amalgamated Sugar Company, one of the defendants, Phillip Stricker received fatal injuries by reason of the premature explosion of a drill hole loaded with blasting powder. His widow and two minor children made application for compensation, which was denied by the Industrial Commission. The applicants now ask this court to review and annul the decision and order of the Industrial Commission refusing compensation and holding that Phillip Stricker was an independent contractor, and not an employé, at the time of his death.

On January 29, 1917, a written agreement was entered into between A. E. Fuhriman and Henry Theurer, two of the defendants herein, and the Amalgamated Sugar Company. The stipulations of that agreement, so far as material here, are:

Fuhriman and Theurer (hereinafter referred to as "contractors") agreed to "properly quarry, break, haul, and deliver and unload at such place or places upon the sugar company's factory grounds, \* \* \* as the said sugar company or its representatives may designate and direct, all the lime rock which the said sugar company shall desire for its use in its sugar factories at Logan and Lewiston, Utah, during the campaign of 1917," and that said rock should be quarried from such portions of the company's rock quarry as the said company might from time to time direct. "The said rock must be broken into pieces of as near uniform size as possible, consisting of cubes measuring not less than two inches nor more than four inches; and if said first party shall deliver rock of any different size, or rock quarried from any other portions of said

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Certiorari. Commission's Decision Affirmed.

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quarry or ledges than where directed by the said sugar company, such rock will not be accepted nor paid for by said sugar company."

Another provision is as follows:

"The said quarrymen agree to properly quarry, break, haul and deliver such rock as fast and in such quantities as the sugar company may desire; all of said rock to be delivered between the 1st day of May, 1917, and the 1st day of December, 1917; said rock to be weighed at the designated place of delivery, and receipts issued therefor by the weighmaster. Such weights shall become final and conclusive and binding upon both of the parties hereto."

It was also agreed that, if the contractors at any time refused or neglected to supply properly skilled workmen or laborers, or tools, or failed in any respect to prosecute the work with promptness and diligence, or failed in the performance of any of the agreements, the sugar company might, at its option, terminate the contract and have immediate access to the quarry, together with the right to employ and use the necessary workmen, laborers, teams, or tools to fully carry out the provisions of the agreement; the cost and expenses of such operation and employment to be chargeable to the contractors. Another stipulation reads as follows:

"\* \* \* The sugar company assumes no responsibility whatever in connection with the work herein contracted for, or in connection with the operation of the quarry aforesaid, but that the said quarrymen assume all such responsibility, whether for wages and moneys due to workmen, laborers, teamsters, or other persons, for performing the work herein contracted for, or whether damages, of whatever kind or nature, caused by or arising from or incidental to the performance of such work."

By another provision of the contract the sugar company agreed to pay to the contractors one dollar and sixty cents for each ton of rock delivered at the company's factory at Logan, Utah, and one dollar and seventy cents for each ton of rock so delivered at the Providence spur track of the Ogden, Logan & Idaho Railway Company and accepted by the said sugar company, payments to be made on the fifteenth of each month for the rock delivered during the preceding month.

On June 18, 1917, Phillip Stricker, the deceased, and Wil-

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liam Oliverson entered into a written agreement with said Fuhriman and Theurer (above referred to as "contractors" and as "quarrymen") in which Stricker and Oliverson agreed to perform all the labor necessary in drilling holes, loading and shooting same, and all other labor necessary or incident to shooting down 20,000 tons of lime rock at the sugar company quarry. Stricker and Oliverson agreed to drill such number of holes as might be necessary in the prosecution of said work, and to do it in a workmanlike manner, and to do all work contemplated by the contract for the sum of one dollar and sixty cents per foot of depth of each of the holes drilled for the shooting of the rock, provided that no holes should be drilled to a less depth than fifteen feet nor to a greater depth than twenty-four feet. Payments for the work done were to be made on the fifteenth of each month for the work completed during the preceding month. The contractors, Fuhriman and Theurer, were to pay for all powder used in the prosecution of the work at the cost price of the same and to furnish necessary drills for use in carrying on the work. It was further agreed that Stricker and Oliverson should act upon their own judgment as to the manner of prosecuting the work, and they were to be in all respects free from any control whatsoever on the part of Fuhriman and Theurer. Stricker and Oliverson were to assume all risks of accident to them or their employés from the conditions obtaining in the quarry, in drilling the holes or loading or shooting same, and generally as to all things connected with the prosecution of the work contemplated by the contract. They agreed to hold the contractors, Fuhriman and Theurer, harmless from all claims or demands whatsoever because of or on account of injury occasioned to either persons or property in the prosecution of the work.

Oliverson was a witness before the commission, and his undisputed testimony removes any doubt which may appear from the contract as to the capacity in which he and Stricker were working. He testified that he and Stricker hired and needed assistants, took complete charge of them, paid their

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Certiorari. Commission's Decision Affirmed.

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wages, and that Fuhriman and Theurer had nothing to do with either of them or the men they employed. Oliverson and Stricker divided the profits, which amounted to about \$180 per month each. They received their board in addition to the pay named in the contract. No suggestions were ever made to them by anybody as to when they should drill. They did their own work in the way they wanted to. If the holes were not fifteen feet deep, they received no pay for them. Their tools, except a hammer, were furnished by the contractors. They were not told when to work or anything about it—when or where to drill nor how to drill. Neither of the contractors at any time exercised any control over them as to the manner of doing the work. The witness testified that he and Stricker at all times did as they saw fit without any interference by any one. It appears from the testimony that all the employes of Fuhriman and Theurer, about six or eight, not including the teamsters, were insured in the state insurance fund except Stricker and Oliverson, and the latter were not insured because they were thought to be, and treated as, independent contractors. The agreement was to board Stricker and Oliverson, though that was not in the written contract.

Mrs. Stricker testified that her husband was to receive fifty cents per day extra; that she had been so informed by Theurer; but that was denied by Theurer. It is claimed by the applicants that under the contract of Fuhriman and Theurer with the sugar company they were employes of the sugar company, and not independent contractors, and, being merely employes, they could not contract with Stricker and Oliverson and change the character of the latter so as to make them independent contractors, and not employes of the sugar company; "in other words, Fuhriman and Theurer, being servants, and not independent contractors, could not lift Phillip Stricker to an independent subcontractor, because they had no authority under their own employment other than being mere servants."

Two questions, therefore, are involved in this case: (1) Were Fuhriman and Theurer independent contractors? and

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(2) if they were independent contractors, were Stricker and Oliverson also independent contractors?

According to the Industrial Commission or Workmen's Compensation Act (section 3111, Comp. Laws Utah 1917), an "employé" is defined as:

"Every person \* \* \* in the service of any person, firm, or corporation employing four or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written. \* \* \*"

The statutory definition adds nothing to the generally accepted definition of "employé." An "employé" is one who works for and under the control of another for hire. See 2 Words and Phrases (New Series) 261.

The definition of an "independent contractor" is equally well settled. An independent contractor is one working for another who has no control as to the means by which the work is accomplished. As stated in 2 Words and Phrases (New Series) 1034, an independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work. Many other definitions of what constitutes an independent contractor are given in Words and Phrases, but there is no departure from the general principle that, where a person lets out work to another under contract, preserving no control over the work or workman, the relation of contractor and contractee exists, and not that of master and servant," and that, "if one renders service to another in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished, he is an independent contractor."

It is vigorously argued by counsel for applicants that the contract entered into between Fuhrman and Theurer and the Amalgamated Sugar Company conspicuously fails to measure up to any standard definition of an independent contract, and in support of their contention they cite *Pot-*



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Certiorari. Commission's Decision Affirmed.

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*torff v. Fidelity C. M. Co.*, 86 Kan. 774, 122 Pac. 120; *In re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598; *Wooton v. Dragon Con. M. Co.*, 54 Utah 459, 181 Pac. 596; *Avery v. Supervisors*, 71 Mich. 547, 39 N. W. 742; *Erath & Flynn v. Allen & Son*, 55 Mo. App. 107; *Bowen v. Aubrey*, 22 Cal. 571; *Arizona-Hercules Copper Co. v. Crenshaw*, 184 Pac. 998; *Kniceley v. West Va. M. R. Co.*, 64 W. Va. 278, 61 S. E. 811, 17 L. R. A. (N. S.) 370; *Cockran v. Rice*, 26 S. D. 393, 128 N. W. 583, Ann. Cas. 1913B, 570; *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 679; *Nelson v. American Cement Plaster Co.*, 84 Kan. 797, 115 Pac. 578; *Hamilton v. Oklahoma Trading Co.*, 33 Okl. 81, 124 Pac. 38; *Cooper v. City of Seattle*, 16 Wash. 462, 47 Pac. 887, 58 Am. St. Rep. 46; *Norwegian-Danish Church v. Home Tel. Co.*, 66 Wash. 511, 119 Pac. 834; *Derr Const. Co. v. Gelruith*, 29 Okl. 538, 120 Pac. 253; *De Palma v. Wienman*, 15 N. M. 68, 103 Pac. 782, 24 L. R. A. (N. S.) 423; *City of Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Interstate Coal Co. v. Trivett*, 155 Ky. 795, 160 S. W. 731; *Waters v. Pioneer Fuel Co.*, 52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564; *Employers' Indemnity Co. v. Kelly Coal Co.*, 156 Ky. 74, 160 S. W. 914, 49 L. R. A. (N. S.) 850.

All the cases cited are readily and easily distinguishable from the instant case, except that of *In re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598, which squarely supports the contention of applicants in an able and vigorous opinion. Speaking for himself alone, the writer would be inclined to adopt the reasoning of the New York case, but is prevented from doing so by two reasons: (1) Because the case was overruled by the Appellate Division, in 174 App. Div. 935, 160 N. Y. Supp. 1143; and (2) the question involved in this case is controlled by *Dayton v. Free et al.*, 46 Utah, 277, 148 Pac. 408. In that case Free and Taylor had a written contract with a mining company to construct a tunnel and to provide all materials and perform all work according to specifications, and were to be paid by the linear foot of tunnel driven. If they failed or refused for six months to do the amount of work stipulated in the speci-

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cations, or if the company had not sufficient funds to justify continuance of the work, the company reserved the right to terminate the contract, but in the event it terminated it without fault of the contractors it was to pay them for all work completed and purchase from them all machinery, appliances, tools, etc., on hand. It was further stipulated in the contract, article 6, that—

“The contractor agrees that he will employ no person on the work, or in or about the premises herein referred to, unless such persons are satisfactory to the company or its agent, and further agrees to furnish said company, when requested, with a full list of all men employed by him, and that he will promptly discharge any man so employed, at the request of said company, in case a reasonable and sufficient cause is assigned therefor.”

Provisions were made in the contract for laying track, pipes, and timbering the tunnel, timbers, pipes, and track to be placed as designated by the company's engineer. The company was required to furnish machinery that was specified and also boarding houses. It also reserved the right to conduct mining operations through the tunnel as it might desire, and the right to order additional work and to make changes in the work. It provided that all imperfect work or material, when pointed out by the engineer of the company, should be immediately remedied and made good by the contractor. These were the salient features of the contract, and it was contended by plaintiff that the relation between the company and the contractors was not that of an independent contractor. This court held that the claim was not tenable. What was said in *Dayton v. Free* is applicable here:

“The things pointed to, in our judgment, do not justify a finding that the company reserved the right to direct, control, or superintend the work, or that it in fact directed or controlled the time or manner of doing it, or the means and methods by which the results were to be accomplished.”

Another case in point is *Callaghan v. Salt Lake City*, 41 Utah, 300, 125 Pac. 863.

We find nothing in the sugar company contract that brings this case within the rule invoked by applicants. No testimony has been introduced tending to show that the contract

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Certiorari. Commission's Decision Affirmed.

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was a subterfuge to evade the provisions of the Workmen's Compensation Act (Comp: Laws 1917, sections 3061-3165). Contracts of that kind should be closely scrutinized by both the Industrial Commission and the courts, and no one should be permitted to shift or evade responsibility by 3 contracts apparently designed to avoid the provisions of the Compensation Act. In this case, however, there is nothing to impeach the bona fides of either of the contracts herein referred to. Under all the authorities that we have examined and especially in the light of *Dayton v. Free*, supra, the contracts are not those between employer and employé. Fuhrman and Theurer and Stricker and Oliverson must all be held, under the contracts and the circumstances of this case, to be independent contractors.

The decision of the Industrial Commission is therefore affirmed.

CORFMAN, C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.



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ABSOLUTE RIGHT TO DIVORCE. See "DIVORCE."

ABUSE OF DISCRETION. See "CRIMINAL LAW," "JURY."

ACCORD AND SATISFACTION. See "EVIDENCE."

## ACTION.

ABOLITION OF FORMS OF ACTION. While the Constitution abolished forms of action, there are still equitable as contradistinguished from legal rights and remedies, but the rights of a litigant depend entirely on the nature or character of the facts and the law applicable thereto. *Lynch v. Jacobsen*, 129.

AGRICULTURAL LABORER. See "MASTER AND SERVANT."

ALIMONY DISCRETIONARY. See "DIVORCE."

ANIMALS. See "LARCENY," "MASTER AND SERVANT."

1. RESTRAINT AND DISPOSAL OF FOR TRESPASS. Laws providing for the restraint, sale, or disposal of animals for trespass and damage must be strictly followed. *Hess v. Udy*, 248.
2. DELIVERY OF TRESPASSING ANIMALS TO POUNDKEEPER OF PRECINCT. Particularly in view of the alternative remedy given by Comp. Laws 1917, section 58, delivery of trespassing pigs by a landowner in F. precinct to the constable as ex officio poundkeeper in G. precinct was not a compliance with section 59, providing that the landowner who distrains trespassing animals shall deliver them within twenty-four hours "to the poundkeeper of the precinct," meaning the poundkeeper of the precinct in which the trespass was committed, and so rendered the landowner liable for conversion. *Hess v. Udy*, 248.

## APPEAL AND ERROR.

1. FINDINGS SUPPORTED BY COMPETENT TESTIMONY NOT REVIEWABLE. Where the record conclusively shows that there is substantial competent testimony to support the trial court's findings, the Supreme Court is powerless to review the record to determine the weight of the testimony. *Malstrom v. Lund*, 353.
2. OBJECTION TO RECOVERY OF COSTS NOT PRESENTED IN INTERMEDIATE COURT NOT REVIEWABLE. Where plaintiff was awarded

costs upon appeal from city to district court which defendant claimed should have been awarded to defendant under Comp. Laws 1917, section 7040, and defendant did not avail himself of the right to move to retax under section 7048, the District Court had no opportunity to pass upon the question, and it cannot be raised for the first time on appeal to the Supreme Court. *Malstrom v. Lund*, 353.

3. **HARMLESS ERROR IN ADMISSION OF EVIDENCE.** The court on appeal cannot reverse for erroneous admission of testimony, where the admissible testimony is sufficient to sustain the court's judgment. *In re Slater's Estate*, 252.
4. **DIAGRAM PRESENTED FIRST ON REHEARING NOT PART OF EVIDENCE.** Where the record shows that a diagram was made by a witness during the trial and was admitted as an exhibit, but the exhibit was not brought up on appeal, and there is nothing in the record to indicate what the exhibit purported to show, a sketch drawn and offered for the first time on application for rehearing cannot be considered as evidence. *Muir v. Murray City*, 368.
5. **PRESUMPTION AS TO JUDGMENT.** Every reasonable intendment must be indulged in favor of the judgment. *Bush v. Bush et ux.*, 237.
6. **NO REVERSAL FOR IRREGULARITIES IN PROCEEDINGS ON MOTION FOR A NEW TRIAL.** Where the appealing party does not complain of any error occurring at the trial, and it is not claimed that he did not have a fair trial, no irregularity in the proceedings on the motion for new trial culminating in a denial of such motion would be sufficient to authorize a reversal, provided the court had jurisdiction to make the rulings complained of, in view of Comp. Laws 1917, sections 6622, 6968. *Harris v. Speirs*, 474.
7. **EVIDENCE CONSIDERED FAVORABLY TO PLAINTIFF ON REVIEW OF JUDGMENT ON DIRECTED VERDICT.** On plaintiff's appeal from judgment for defendant on directed verdict, the Supreme Court will consider and apply the evidence in the light most favorable to plaintiff's cause of action. *Groesbeck v. Lakeside Printing Co.*, 335.
8. **MOTION FOR NEW TRIAL EQUIVALENT ON APPEAL TO REQUEST FOR DIRECTED VERDICT.** Motion of several defendants for new trial on account of insufficiency of the evidence to justify verdict against them was equivalent to request for a directed verdict, and should have the same effect on appeal, though the motion was submitted without argument, and disposed of without specification of the particulars in which the evidence was claimed to be insufficient. *Fozley v. Gallagher*, 298.
9. **INSUFFICIENCY OF EVIDENCE WAIVED BY FAILURE TO MOVE FOR VERDICT AND NEW TRIAL.** If after failing to move for directed verdict defendants had also failed to move for a new trial for insufficiency of evidence to sustain verdict against them, the question of the insufficiency of the evidence would not have been waived on appeal. *Fozley v. Gallagher*, 298.

10. COURT DOES NOT ERR IN FAILING TO SET ASIDE VERDICT ON OWN MOTION. Where certain defendants, neither of themselves nor by their counsel, requested or moved the trial court to set aside the verdict as against them as unsupported by evidence, the assignment that the court erred in failing to act on its own motion cannot be sustained except perhaps in a very extreme case. *Foxley v. Gallagher*, 298.
11. EXCLUSION OF EVIDENCE HARMLESS ERROR. Where every legitimate purpose for which a former question to which objection was sustained could have been asked was fully covered by the answer of the same witness to a subsequent question, any error in sustaining objection to the first question was harmless. *Foxley v. Gallagher*, 298.
12. BILL OF EXCEPTIONS MUST SHOW SERVICE OF NOTICE OF ENTRY OF JUDGMENT. Where the bill of exceptions did not show service of notice of entry of judgment, the bill, which was prepared and presented for settlement within the six months period, will be deemed to have been presented in time, notwithstanding a document purporting to be a notice of entry of judgment, served on defendant appellant, appeared in the transcript sent up by the clerk of the District Court, for as the bill of exceptions showed no service, Comp. Laws, 1917, section 6969, requiring the bill of exceptions to be prepared and served within thirty days after service of notice of judgment, has no application. *Fisher v. Bonneville Hotel Co.*, 538.
13. IN EQUITY SUIT SUPREME COURT HAS DUTY TO REVIEW EVIDENCE. In an equity proceeding, as for decree adjudging plaintiffs to be owners of a water fling, quieting title thereto as against defendants, and annulling an alleged sale or assignment thereof, it is the duty of the Supreme Court to review the evidence and determine whether the findings of the lower court are supported by the weight of the testimony. *Bracken et al. v. Chadburn*, 430.
14. FINDINGS IN EQUITY MAY BE DISREGARDED. In an equity case, when the findings of fact are clearly not justified by the evidence, in the opinion of the Supreme Court, it is the court's duty to arrive at the conclusion it thinks compelled by the proof, regardless of the trial judge. *Crom et al. v. Reynolds*, 384.
15. REFUSAL OF INSTRUCTIONS EXPLAINING UNAMBIGUOUS CONTRACT PREJUDICIAL ERROR. In an action for breach of a contract to deliver lambs sold, where defendant claimed that the agreement required only wether lambs born of his herd to be delivered, which requirement did not appear in contract, it was prejudicial error to refuse to instruct, as requested, that contract was not so limited. *Armstrong v. Larson*, 347.
16. ASSIGNMENTS WAIVED BY FAILURE TO ARGUE. An assignment not argued either orally or in brief is abandoned. *Hansen v. Oregon Short Line R. Co.*, 577.
17. WHERE PORTION OF INSTRUCTION GOOD, EXCEPTION TO WHOLE CANNOT BE SUSTAINED. Where an exception was taken to an instruction as a whole, such exception cannot be sustained on

appeal if any part of the instruction is good. *Hansen v. Oregon Short Line R. Co.*, 577.

18. **ASSIGNMENT MUST POINT OUT INSUFFICIENCY OF EVIDENCE.** Under court rule 26 (54 Utah XV.) (97 Pac. x), which contains the same requirement as Comp. Laws 1917, section 6967, but allows appellants to make specification of the insufficiency of evidence in the assignment of error instead of the bill of exceptions, an assignment complaining that the court erred in refusing a requested instruction that the evidence was insufficient to support a verdict for defendant cannot be considered where the insufficiency of the evidence was not pointed out. *Hansen v. Oregon Short Line R. Co.*, 577.
19. **INSUFFICIENCY OF RECORD TO ESTABLISH VALUE AT TRANSFER OF ASSETS TO NEW CORPORATION.** In a creditor's bill to subject property of a debtor irrigation company passing into the hands of another corporation to his claims, failure to determine whether the irrigation company was insolvent at a particular time leaves the Supreme Court unable to direct what findings should be made as to the price of the stock or water shares in the new company at the time of the transfer to it from the irrigation company; the price fixed in a trust agreement for transfer being purely fictitious. *Hoggan v. Price River Irr. Co.*, 170.
20. **FILING OF AMENDED COMPLAINT SETTING UP NEW CAUSE OF ACTION HARMLESS.** The denial of defendant's motion to strike from the file an amended and supplemental complaint, because additional causes of action were set forth, referring to an allegation asking attorney's fees which was not in the original complaint, was not prejudicial error, where no attorney's fees were allowed and no further attention paid by either counsel or court to the question of attorney's fees. *Hoggan v. Price River Irr. Co.*, 170.
21. **DISMISSAL OF PREMATURE APPEAL.** An appeal taken prematurely is of no avail, and should be dismissed on application. *Thornton et al. v. Evans, Judge*, 505.
22. **ASSIGNMENT OF ERROR ON DIRECTION OF VERDICT.** The assignments of error relied on by plaintiff appellant all challenging the action of the court in directing verdict, the question raised on appeal is whether defendant as a matter of law can be held under the facts and circumstances to answer for the damages sustained by plaintiff. *Shepard v. Utah Light & Traction Co.*, 186.
23. **REVIEW OF DISCRETION IN RULING ON MOTION FOR NEW TRIAL.** The granting or denial of a motion for new trial founded on the insufficiency of the evidence to justify the verdict, where the evidence is conflicting, rests in the sound legal discretion of the trial judge, and his decision will not be disturbed on appeal unless there is a clear abuse of discretion. *Valiottis v. Utah-Apex Mining Co.*, 151.
24. **REVIEW OF QUESTIONS OF FACT.** By constitutional provision, appeals do not lie on questions of fact in law cases. *Valiottis v. Utah-Apex Mining Co.*, 151.



25. REVIEW OF RULING OF MOTION FOR NEW TRIAL. Appellate Court will examine evidence to ascertain whether there is a substantial conflict or whether there is substantial evidence to support verdict, and if there is a substantial conflict will hold that lower court did not abuse its discretion in refusing new trial, but if evidence is incredible or inherently improbable or inconsistent with natural laws as to impel conclusion that the verdict is result of mistake, prejudice, or passion, court will hold lower court in error notwithstanding some conflict in the evidence. *Vallottis v. Utah-Apex Mining Co.*, 151.
26. HARMLESS ERROR IN EXCLUSION OF DOCUMENTARY EVIDENCE OTHERWISE DEVELOPED. In a plate glass insurer's action against a garage keeper for damages through the negligence of the keeper's employé in backing an auto bus into a hotel front, exclusion from evidence of a book of accounts between defendant garage keeper and a third person, who drove the bus on a percentage basis, held harmless to defendant, who testified at great length and without contradiction as to his business and settlements with the bus operator. *N. Y. Plate Glass Ins. Co. v. Martines*, 292.

#### ASSAULT AND BATTERY.

1. HOMICIDE—JUSTIFICATION AT COMMON LAW. Under the common law, the rule was that homicide or an assault with a deadly weapon could not be justified in the defense of habitation, property, or person, unless there was an actual necessity for the act. *State v. Terrell*, 314.
2. JUSTIFICATION IN DEFENSE OF PROPERTY. In a prosecution for assault with a deadly weapon with intent to do bodily harm, accused having shot one burglarizing his rabbit pens, the fact as to whether or not there was a reasonable necessity for the shooting under Comp. Laws 1917, section 8032, was a question to be determined from the testimony by the jury under proper instructions. *State v. Terrell*, 314.
3. JUSTIFICATION OF ASSAULT WITH DEADLY WEAPON. The same rules of law are applicable with respect to justification in cases of assault with a deadly weapon with intent to do bodily harm as in cases of homicide, and one accused of such an assault may invoke Comp. Laws 1917, section 8032, relating to justifiable homicide. *State v. Terrell*, 314.
4. HOMICIDE—FORCE MUST BE REASONABLY NECESSARY TO CONSTITUTE JUSTIFICATION. Homicide or an assault with a deadly weapon cannot be justified under Comp. Laws 1917, section 8032, unless in the necessary defense of habitation, property, or person, and, if the necessity fails, the right to invoke the statute fails, and, although the necessity need not be real, it must be reasonably apparent, and the resistance offered in good faith, upon reasonable grounds of belief that the invasion of some right created by the statute is being made by the offender, in which case only such force may be employed as may be reasonably required to successfully repel the invader, in view of section 8033 and section 8561, subd. 2. *State v. Terrell*, 314.

## ATTORNEY AND CLIENT.

COUNSEL'S ADMISSION OF CONCLUSION OF LAW NOT BINDING ON CLIENT OR COURT. Counsel's admission of a legal conclusion is binding neither on his client nor on the court; it being the court's duty to declare the law as it exists, regardless of concessions. *In re Hansen's Estate*, 23.

## BANKS AND BANKING.

1. COMPLAINT IN ACTION ON DOUBLE LIABILITY OF SHAREHOLDERS. The allegations of a complaint by a receiver of an insolvent bank seeking to enforce the double liability of stockholders, that the bank was hopelessly insolvent, and that its assets were insufficient to pay its debts, and that it was necessary to collect the full amount of the statutory stockholders' liability, sufficiently show the necessity of enforcing stockholders' liability. *Lynch v. Jacobsen*, 129.
2. RECEIVER MAY ENFORCE STOCKHOLDERS' LIABILITY. Under Laws 1911, chapter 25, section 34, providing that a receiver, if appointed for a bank, shall, under direction of the court, take possession of the assets of every description, and may, if necessary to pay the debts, enforce all the individual liabilities of stockholders, a receiver is not limited to the general assets, but, may, under order of court, enforce the stockholders' liability. *Lynch v. Jacobsen*, 129.
3. ENFORCEMENT OF STOCKHOLDERS' LIABILITY. Receiver of insolvent bank who finds it necessary to enforce stockholders' double liability may sue as many of the stockholders in one and the same action as may be most convenient, indeed, if he wish, he may sue all stockholders in a single action; and for the same reason a stockholder sued separately may, where the rights of others would not be prejudiced, have his case heard in connection with cases against other stockholders. *Lynch v. Jacobsen*, 129.
4. ENFORCEMENT OF DOUBLE LIABILITY OF STOCKHOLDERS. Where Constitution provides double liability for bank stockholders in favor of creditors, but does not fix how it shall be enforced the bank's creditors may enforce the liability in an ordinary action, either at law or in equity, though it seems that actions in equity have the preference under such circumstances. *Lynch v. Jacobsen*, 129.
5. ENFORCEMENT OF STOCKHOLDERS' DOUBLE LIABILITY. It is not essential to the enforcement of double liability imposed by law upon bank stockholders that all of the bank's assets be first exhausted, where it is apparent that the bank is insolvent. *Lynch v. Jacobsen*, 129.
6. DETERMINATION OF DOUBLE LIABILITY OF SHAREHOLDERS. The order or judgment of the court declaring a bank insolvent and finding that it is necessary to enforce the stockholders' additional liability to pay the bank's debts in the absence of fraud or collusion, is conclusive upon stockholders, and they may not assail it save in a direct proceeding. *Lynch v. Jacobsen*, 129.

7. **ENFORCEMENT OF DOUBLE LIABILITY OF STOCKHOLDERS.** Where constitutional provision imposing double liability on stockholders of banks fails to determine by whom the liability for benefit of creditors may be enforced, the Legislature may at any time determine who may sue the stockholders and what the nature of the proceedings shall be. *Lynch v. Jacobsen*, 129.
8. **RECEIVER MAY ENFORCE DOUBLE LIABILITY OF STOCKHOLDERS.** Where Constitution imposes a double liability for benefit of creditors on bank stockholders, a receiver, appointed to take charge of an insolvent bank's assets and wind up its affairs, may sue to enforce the liability. *Lynch v. Jacobsen*, 129.
9. **DETERMINATION OF DOUBLE LIABILITY OF SHAREHOLDERS.** The order or judgment of the court declaring a bank insolvent and finding that it is necessary to enforce the stockholders' additional liability to pay the bank's debts, in the absence of fraud or collusion is conclusive. *Lynch v. Jacobsen*, 129.

**BILL OF EXCEPTIONS.** See "APPEAL AND ERROR," "EXCEPTIONS."

**BREACH OF CONTRACT.** See "CONTRACTS," "TRIAL."

#### **BROKERS.**

1. **PERFORMANCE OF CONDITION SUBSEQUENT MUST BE PLEADED.** In a broker's action for commission, where defendants failed to plead as a defense that a condition subsequent embraced in the sale contract had not been performed, it was not error to refuse defendant's offered testimony thereon. *Associated Inv. Co. v. Cayias*, 377.
2. **ADMISSIBILITY OF EVIDENCE OF PRINCIPAL'S BREACH OF CONTRACT.** In a broker's action for commission on the sale of a pool hall, testimony tending to show defendants' refusal to carry out the terms of the contract held admissible. *Associated Inv. Co. v. Cayias*, 377.
3. **BROKER SUING FOR COMMISSION NEED NOT PLEAD AND PROVE CONDITION SUBSEQUENT.** In broker's action for commission on sale of a pool hall, where sale contract provided that it was to be null and void if purchaser could not secure rental of the hall at a certain sum per month, plaintiff was not required to plead or prove the ability of the purchaser to procure the hall at such rental, that being a matter of defense, as a condition subsequent, and not a condition precedent. *Associated Inv. Co. v. Cayias*, 377.

**BURGLARY.** See "ASSAULT AND BATTERY," "CRIMINAL LAW."

1. **RABBIT PENS MAY BE BURGLARIZED.** Rabbit pens in a back yard permanently constructed for the purpose of housing rabbits are embraced within the kind of structures that may be burglarized, under Comp. Laws 1917, section 8259. *State v. Terrell*, 314.

## CARRIERS.

1. PERSONS AT STATION ABOUT TRAIN TIME INTENDING TO TAKE PASSAGE ARE "PASSENGERS." Where plaintiff called at railroad company's station about noon expecting a pass, and, being informed that the pass had not arrived, but would arrive by mail on the noon train, repaired to a nearby town and obtained the pass, returning to the station before the train was due, and, though the night was cold, and it was customary to keep open the waiting room on cold nights, and the agent knew that plaintiff would return and heard him outside, was refused admission, plaintiff must be deemed a "passenger" and entitled to recover for injury from exposure; for the relation of passenger and carrier begins as soon as one intending in good faith to become a passenger enters in a lawful manner upon the carrier's premises for that purpose. *Hansen v. Oregon Short Line R. Co.*, 577.
2. CARRIER OWES SAME DUTY TO GRATUITOUS PASSENGER AS OTHERS. A carrier owes the same duty to a gratuitous passenger riding on a pass as to others. *Hansen v. Oregon Short Line R. Co.*, 577.

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CONDITION SUBSEQUENT. See "BROKERS."

CONSTITUTIONAL LAW. See "MASTER AND SERVANT."

1. COURTS MAY NOT STRIKE DOWN LAWS BECAUSE LACKING IN DETAIL. The courts may not strike down laws or refuse their enforcement because they may be imperfect or lacking in some detail; it being the duty of the court to enforce the law as it finds it, regardless of what the results in a particular case may be. *Woodcock v. Board of Education*, 458.
2. PROVISION FOR DOUBLE LIABILITY OF BANK STOCK IS SELF-EXECUTING. A constitutional provision imposing double liability on bank stockholders is self-executing. *Lynch v. Jacobsen*, 129.
3. ENFORCEMENT OF DOUBLE LIABILITY ON BANK STOCK. The right to enforce the double liability imposed by Const. art. 12, section 18, on bank stockholders for the benefit of creditors, is not given by the Constitution to creditors; and, while not technically an asset of the corporation, it was competent for the Legislature to provide as it did by Laws 1911, chapter 25, section 34, for enforcement of such liability by a receiver appointed on insolvency of a bank. *Lynch v. Jacobsen*, 129.
4. SELF-EXECUTING PROVISIONS FIXING LIABILITY OF BANK STOCKHOLDERS. Where the Constitution imposes a liability without prescribing a remedy, its provision is a mere limitation on the power of the Legislature which may fix a remedy, but until the Legislature acts the courts will, the constitutional provision being self-executing, enforce the liability in accordance with some known remedy. *Lynch v. Jacobsen*, 129.
5. CHANGE OF MODE OF ENFORCEMENT OF DOUBLE LIABILITY OF STOCKHOLDERS. Where state Constitution imposes a double liability on bank stockholders, the method of enforcing the liability may be changed by the Legislature, provided such change does not affect or enlarge the liability of the stockholders, and the Constitution does not itself provide a method of procedure. *Lynch v. Jacobsen*, 129.
6. STATUTES HELD VALID UNLESS CLEARLY UNCONSTITUTIONAL. A legislative act cannot be stricken down on the ground that it is unconstitutional unless it is clearly and palpably so. *Lynch v. Jacobsen*, 129.
7. DUE PROCESS DENIED BY SETTING ASIDE DIVORCE DECREE WITHOUT NOTICE. To set aside a divorce decree granted the wife without notice and an opportunity to be heard would deny due process of law as the interlocutory decree gave the wife personal and property rights, of which she could be deprived only by due process of law. *Rasmussen v. Call*, 597.

CONTRACTS. See "REFORMATION OF INSTRUMENTS."

1. RESCISSION FOR BREACH RELIEVING INJURED PARTY FROM FURTHER PERFORMANCE. Where a contract is entire, and remains executory in whole or in part, and one party commits a breach of his duty, and the other is not in default, the latter may

rescind and be relieved from further performance. *Pool v. Motter*, 288.

2. **ACCEPTANCE WITHOUT KNOWLEDGE OF DEFECTS NOT EFFECTIVE TO WAIVE DEFECTS.** Where a subcontractor doing the painting on a school building, after being warned that defective materials would not be accepted, falsely assured the inspector for the school authorities that the materials used were substantially those specified in contract, any acceptance of the work based on such false representations of the subcontractor is not binding so as to prevent the general contractor, who would be required to make the deficiency good, from recovering from the subcontractor damages resulting from his failure to comply with the specifications. *Board of Education of Salt Lake City v. West*, 357.
3. **WAIVER OF DEFECTIVE PERFORMANCE BY PART PAYMENT.** Payment by contractor to subcontractor of a sum to apply on the subcontract, made before contractor knew that materials used by subcontractor were inferior and not in substantial compliance with the specifications and contract, was not a waiver of such defects. *Board of Education of Salt Lake City v. West*, 357.
4. **NECESSITY OF INSTRUCTIONS AS TO RIGHTS OF PARTIES UNDER UNAMBIGUOUS CONTRACT.** Where the terms of a written contract sued upon are neither ambiguous nor uncertain, it is the duty of the court to construe the contract and to advise the jury of the respective rights of the parties thereunder. *Armstrong v. Larsen*, 347.

**CONTRIBUTORY NEGLIGENCE.** See "MASTER AND SERVANT."

#### **CORPORATIONS.**

1. **NEW CORPORATION ORGANIZED BY SELLER'S STOCKHOLDERS LIABLE FOR SELLER'S DEBTS.** The management of one corporation may organize another and transfer its property to the new corporation, but if it does so, even with the consent of all its stockholders, the new corporation is liable for the debts of the other to the extent of the value of the property received; and, assuming that such conveyance was not void unless fraudulent, nor for the purpose of hindering or defrauding creditors, the creditors still have the right to follow the property thus transferred. *Hoggan v. Price River Irr. Co. et al.*, 170.
2. **STOCKHOLDERS ON TRANSFER TO NEW CORPORATION HAVING SAME DIRECTORS, NOT LIABLE FOR ULTRA VIRES ACTS.** Evidence held not to show transactions by which debtor corporation was stripped of all its property resulted from fraud or bad faith of the directors, or that there was any dissipation of assets in making such conveyances, or any intent that such transactions should be of advantage to the directors of both the selling and buying corporation, except perhaps incidentally as stockholders and defendants in creditors' action, and those stockholders who were not directors of the debtor corporation at the time of such transfer were not accountable for the corporation's illegal or ultra vires acts. *Hoggan v. Price River Irr. Co. et al.*, 170.



3. **PAYMENT OF NOTES TO DIRECTOR WHEN CORPORATION WAS INSOLVENT.** Where a corporation was willing to make unusually liberal discounts to a stockholder purchasing its notes, the purchaser would not for such reason be charged with fraud or dishonesty, but if such purchaser was a director when presenting the purchase notes for payment, and the company was then insolvent, he would not be justified in accepting and appropriating shares in a new corporation in payment of such debts, thus depriving other creditors of a fund to which they were entitled, and as director he must be presumed to know the corporation's financial condition. *Hoggan v. Price River Irr. Co. et al.*, 170.
4. **RIGHTS OF OFFICERS AND STOCKHOLDERS UNDER CREDITORS' BILL.** Where individual stockholders, defendants in a creditor's suit, paid out their money for the corporation a stockholder, who was not a director of the debtor corporation, had a right to accept a preference by payment in corporate stock whether the company was insolvent or not, but a director of an insolvent corporation had no right to do so whether he became creditor as guarantor, indorser, or surety. *Hoggan v. Price River Irr. Co. et al.*, 170.
5. **RIGHTS OF CREDITORS ON TRANSFER OF PROPERTY TO NEW CORPORATION—SALES.** A trust agreement, under which all the property of the debtor corporation was transferred to a new corporation, construed and held to provide that the proceeds of sale of water shares would be applied first to pay the debts of the company incurred in connection with the construction of its irrigation project, excepting only a loan from the state, so that a creditor of the company was entitled to payment out of the proceeds of stock sales. *Hoggan v. Price River Irr. Co.*, 170.
6. **ACTS OF DEFUNCT CORPORATION ABSOLUTELY VOID AND NOT SUBJECT TO RATIFICATION.** Any acts of its officers in the nature of a new business not looking to a winding up of the affairs of the corporation, were wholly void and could not be ratified by the corporation, notwithstanding Comp. Laws 1917, section 870. *Houston et al. v. Utah Lake, etc., Co.*, 393.
7. **CORPORATION FORFEITING CHARTER NOT DE JURE OR DE FACTO.** It was then civilly dead, and was neither a de jure nor a de facto corporation, and had no power except to wind up its affairs under Comp. Laws 1917, section 870. *Houston et al. v. Utah Lake, etc., Co.*, 393.
8. **COULD NOT PURCHASE CORPORATE STOCK OF ANOTHER CORPORATION AFTER FORFEITURE OF CHARTER.** Acts of officers of the corporation in subsequently purchasing corporate stock of another corporation were absolutely void, such acts not looking to the assembling of its assets or the winding up of the business under Comp. Laws 1917, section 870, especially where such corporation, while existent, had no authority or power to purchase corporate stock. *Houston et al. v. Utah Lake, etc., Co.*, 393.
9. **AUTHORITY OF PRESIDENT DIED WITH CORPORATION.** Where the right of a corporation to do business was annulled and its charter forfeited because it failed to pay the state corporation

license tax, any authority that the president of the corporation had by virtue of resolutions of the board of directors died with the corporation. *Houston et al. v. Utah Lake, etc., Co.*, 393.

10. **WORLD MUST TAKE NOTICE OF GOVERNOR'S PROCLAMATION OF FORFEITURE OF CHARTER.** A proclamation of the Governor of the state to forfeit the charter of a corporation because it failed to pay the state license tax was notice to all the world that thereafter, unless reinstated within the time by law provided, the corporation had no right and no power to engage in any business whatever, except such as would be necessary for the purpose of winding up its affairs. *Houston et al. v. Utah Lake, etc., Co.*, 393.
11. **"ULTRA VIRES" ACT AN ACT BEYOND POWERS.** An "ultra vires" act is an act beyond the powers of the corporation. *Houston v. Utah Lake, etc., Co.*, 393.

**COSTS.** See "APPEAL AND ERROR."

1. **NEW ACTION HELD NOT PRESUMPTIVELY VEXATIOUS SO AS TO STAY SECOND ACTION UNTIL PAYMENT OF COSTS.** Where an action is dismissed without prejudice, a second action commenced within due time, under Comp. Laws 1917, sections 6484, 6848, 6859, is not presumptively vexatious, and the trial court cannot, in the absence of a showing that the second suit is in fact vexatious, grant an order suspending further proceeding in the cause until payment of a judgment for cost rendered in the first case. *Peterson v. Evans, Judge*, 505.
2. **COSTS DIVIDED WHERE ERROR IN JUDGMENT WAS ONE ONLY OF COMPUTATION.** Where the findings of fact of the District Court were correct, and the only error in the judgment was one of computation, costs will on appeal be divided, though the cause was remanded, with direction to correct the error. *Board of Education of Salt Lake City v. West*, 357.

**COUNTIES.** See "HIGHWAYS."

**RIGHT OF COUNTY COMMISSIONERS TO OBSTRUCT HIGHWAYS.** The county officials have a lawful right to temporarily obstruct highways under their jurisdiction for purpose of making improvements and repairs, and this right, when properly exercised, is paramount to the right of the public to free and unobstructed travel. *Shepard v. Utah Light & Traction Co.*, 186.

**COURTS.**

**PREMATURE APPEAL FROM CITY TO DISTRICT COURT.** Under Comp. Laws Utah 1917, section 7514, where no judgment was actually entered in the city court until January 9th, notice and undertaking on appeal filed by defendant the preceding December 9th were premature and ineffectual for purposes of an appeal to the District Court, despite a stipulation of the parties that the clerk might enter judgment dated nunc pro tunc as of November 26th. *Thornton et al. v. Evans, Judge, et al.*, 268.

CRIMINAL LAW. See "ASSAULT AND BATTERY," "BURGLARY," "RAPE."

1. **INSTRUCTIONS AS TO JUSTIFIABLE HOMICIDE ERRONEOUS.** In a prosecution for assault with a deadly weapon with intent to do bodily harm, instructions defining burglary, and stating that "one may kill to save life or limb or prevent a great crime, \* \* \* but not to restrain commission of a misdemeanor," and "a felony is a crime which may be punishable with death or imprisonment in the state prison," and that "every other crime is a misdemeanor," were erroneous, where the court failed to state whether burglary constituted a "great crime," a felony, or a misdemeanor, or whether burglary was punishable by imprisonment in the state's prison, but instructed that larceny is "a secret crime not attended with force," and the "killing of one person by another or the attempt to kill to prevent larceny of a small amount, such as petit larceny, is not justified"; the complaining witness having been shot while burglarizing a rabbit pen. *State v. Terrell*, 314.
2. **REFUSAL TO GIVE REQUESTED INSTRUCTION CONCERNING JUSTIFICATION ERROR.** In a prosecution for assault with a deadly weapon with intent to inflict bodily harm, defendant having shot another who was burglarizing his rabbit pen, a request for an instruction, "If you believe that when complaining witness, R., was shot he was committing a burglary and stealing defendant's rabbits, then defendant was justified in shooting," although such instruction could not have been properly given without a qualification, rendered it error for the court not to give the substance of such instruction with proper qualifications. *State v. Terrell*, 314.
5. **PRELIMINARY EXAMINATION MAY BE WAIVED BY ACCUSED ALONE.** A preliminary examination is a substantial right of one accused of a felony, and when he waives that right it must be of his own choice, not because an arresting officer insists upon the waiver. *State v. Overson*, 230.
6. **INSTRUCTION OMITTING ESSENTIAL ELEMENT.** Instruction as to possession of recently stolen property by defendant, prosecuted for burglary, held misleading, in that it omitted essential element that accused's presence at the place where the property was stolen or the burglary committed must have been at or near the time when the crime was committed. *State v. Overson*, 230.
7. **INSTRUCTIONS ASSUMING FACTS.** Instructions which assume that there is evidence before the jury tending to prove material facts, when there is no such evidence, are improper. *State v. Overson*, 230.
8. **INSTRUCTIONS AS TO POSSESSION OF STOLEN GOODS.** In instruction relative to possession of recently stolen property, the circumstances should have been submitted to jury without statement that they "may raise a presumption of guilt in the possessor." *State v. Overson*, 230.
9. **GIVING INSTRUCTION NOT SUPPORTED BY EVIDENCE REVERSIBLE ERROR.** Instruction, that, if possession of recently stolen prop-

erty is accompanied with such evidence as the defendant's giving false, incredible, or contradictory accounts of the manner of acquiring it, his attempting to conceal it, or his being so near to the place where the property was stolen or the building entered as to create criminating circumstances against him, such and other like circumstances may create a presumption of guilt in possessor, requires reversal; there being no evidence to support the instruction. *State v. Overson*, 230.

10. **REVERSIBLE ERROR FOR PROSECUTING ATTORNEY TO TELL JURY THAT IT WAS AGAINST LAW TO IMPEACH DEFENDANT.** In a criminal prosecution, it was prejudicial error for the prosecuting attorney in his closing argument to the jury to state that it was against the law to impeach the defendant for truth and veracity until he himself had first put his reputation in issue, the court's only caution being that the jury should pay no attention to what counsel said, but should confine their deliberations to the evidence where the liberty of the defendant depended upon the statement of one witness as against the statements of others. *State v. Scott*, 553.
11. **LATITUDE IN CROSS-EXAMINATION NOT DISTURBED EXCEPT FOR ABUSE OF DISCRETION.** While it is true that much latitude must be allowed to the trial courts in permitting cross-examination of witnesses, and that their rulings in that regard will not be disturbed, unless it is made to appear that the discretion with which the law invests them has been abused, yet when it is manifest that legitimate bounds of cross-examination by the state of its own witness have been exceeded to the prejudice of the defendant a judgment of conviction cannot stand. *State v. Scott*, 553.
12. **OTHER ACTS OF INTERCOURSE BETWEEN PROSECUTRIX AND ACCUSED ORDINARILY COMPETENT.** That the prosecutrix in a rape case has had intercourse with the defendant at other times than the one in question may ordinarily be shown. *State v. Scott*, 553.
13. **REMARK BY COURT THAT WITNESS INTERROGATED NEED NOT INCRIMINATE HIMSELF HELD IMPROPER.** In a criminal prosecution, where defendant produced a witness to testify that the general reputation of the prosecutrix for truth and veracity was bad, and the prosecuting attorney on cross-examination asked, "What is your reputation for truth and veracity?" the court's ruling, "I don't think he is required to convict or incriminate himself," was improper as necessarily destroying the whole effect of the witness' impeaching testimony. *State v. Scott*, 553.
14. **EXCLUDING TESTIMONY FOR WRONG REASON NOT ERROR.** If the ruling of the court in excluding testimony was right for any reason, the court committed no error. *State v. Overson*, 230.
15. **COURTS TAKE JUDICIAL NOTICE OF NATURAL LAWS AND TIME OF SUNSET.** Courts are bound to take judicial notice of natural laws, and hence that at Milford the sun set on the evening of December 13th at five o'clock, that darkness of night set in at six o'clock, and that it was completely dark before seven o'clock and that the sun passes below the horizon more nearly perpendicularly in winter than in summer, and that twilight

is correspondingly shorter in winter than it is in summer. *State v. Scott*, 553.

16. **JURY SHOULD BE INSTRUCTED THAT PROSECUTRIX HAS INTEREST IN RESULT OF CASE.** In a prosecution for rape, the court erred in instructing that it was the province of the jury to weigh the testimony of the female "as of any other witness testifying in the case," since the court should point out that the prosecutrix necessarily has a greater interest in the result of such case than a disinterested witness would have, and that the jury should consider and weigh her testimony with that fact in mind. *State v. Scott*, 553.
17. **RECORD NOT SHOWING EVIDENCE, OVERRULING OF MOTION TO QUASH SUSTAINED.** Where bill of exceptions shows that hearing was had on motion to quash information, and that the court heard evidence which the record fails to show, the presumption is that evidence was sufficient to justify trial court in overruling motion. *State v. Overson*, 230.
18. **MISLEADING INSTRUCTION AS TO EVIDENCE.** When evidence is referred to in an instruction, it should not be stated in a manner to mislead jurors or to cause confusion in their minds. *State v. Overson*, 230.
19. **HEARSAY EVIDENCE OF ADMISSION OF THIRD PERSON INADMISSIBLE.** In prosecution for burglary, testimony of wife that her husband, who had been arrested on the same charge, tried, and discharged, stated that he got some of the property stolen at a named place when he was alone, was hearsay and inadmissible. *State v. Overson*, 230.
20. **GENERAL EXCEPTION TO INSTRUCTION INSUFFICIENT.** A general exception to an instruction containing different propositions, six of which are correct statements of law, is not available on appeal. *State v. Overson*, 230.
21. **DEFINITION OF REASONABLE DOUBT.** In prosecution for burglary, instruction defining reasonable doubt as "a doubt for which you can give a reason," while not commended, held not prejudicial error. *State v. Overson*, 230.

#### DAMAGES.

**PRESUMPTION OF DAMAGES TO GENERAL CONTRACTOR BY SUBCONTRACTOR'S USE OF DEFECTIVE MATERIAL.** Where a subcontractor engaged to paint a school building used defective materials which did not comply with the contract and which would not last so well as those specified, the general contractor may recover damages resulting from the subcontractor's use of defective material; there being no presumption that the school authorities would not hold the general contractor to strict accountability and require compliance with the specifications of the contract. *Board of Education of Salt Lake City v. West*, 357.

**DENYING DUE PROCESS.** See "CONSTITUTIONAL LAW."

**DIRECTED VERDICT.** See "APPEAL AND ERROR."

## DIVORCE.

1. DECREE CANNOT BE SET ASIDE WITHOUT NOTICE AND OPPORTUNITY TO BE HEARD. Comp. Laws 1917, section 3002, providing that a decree of divorce shall become absolute six months after its entry, unless the court for sufficient cause, on its own motion or the application of any party, otherwise orders, does not authorize the court to set aside a decree of divorce granted the wife without notice to her and an opportunity to be heard. *Rasmussen v. Call*, 597.
2. RIGHT TO DIVORCE ABSOLUTE AND NOT DISCRETIONARY. The right to divorce when the parties are before the court, the pleadings are sufficient to support a decree, and the degree of proof necessary to convince the court that there are sufficient grounds is present, is absolute, and not discretionary with the court, in view of Comp. Laws 1917, section 2999. *Rasmussen v. Call*, 597.
3. HUSBAND'S CONVEYANCE OF PROPERTY JOINTLY OWNED WITH WIFE HELD NOT VOID AS TO WIFE, THEREAFTER PROCURING DIVORCE. Husband's conveyance of his interest in property jointly owned with wife, not constituting a homestead, was not void as to wife, who thereafter obtained a divorce, in which court, under Comp. Laws 1917, section 3000, in rendering decree, determined the property rights of the parties; the husband having had the right to sell his interest without wife's consent, subject only to wife's one-third interest in case she continued to be his wife and survived him, notwithstanding section 8346. *Adamson v. Adamson*, 544.
4. COMPLAINT HELD INSUFFICIENT AS TO CREDITORS' BILL. Complaint, in wife's action for divorce and alimony and to set aside an alleged fraudulent conveyance of real property from husband to his father, was not sufficient as a creditors' bill where it did not show that plaintiff had procured a judgment or that defendant was insolvent. *Adamson v. Adamson*, 544.
5. PURCHASE OF PROPERTY FROM HUSBAND ON INSTALLMENTS NOT CONCLUSIVELY FRAUDULENT. The fact that price of property purchased from husband was paid in installments is not conclusive of fraud, but at best only raises a presumption. *Adamson v. Adamson*, 544.
6. EVIDENCE HELD TO SHOW PURCHASE OF HUSBAND'S PROPERTY IN GOOD FAITH AND FOR FULL VALUE. In wife's action for divorce and for cancellation of husband's alleged fraudulent conveyance of interest in land to his father, evidence held to support finding that the father purchased the property in good faith and paid full value therefor. *Adamson v. Adamson*, 544.
7. REFUSAL OF ALIMONY HELD NOT AN ABUSE OF DISCRETION. Where wife was engaged in a business paying her about \$100 a month, and was joint owner with husband in property renting for thirty dollars a month, and where husband was addicted to drink, was without business, and had no property, except the joint interest with the wife in such property and a small lot worth less than \$100, the court's refusal in giving wife a divorce, to grant her alimony, held not an abuse of discretion. *Adamson v. Adamson*, 544.

8. **HUSBAND'S CONVEYANCE OF PROPERTY JOINTLY OWNED WITH WIFE HELD NOT FRAUDULENT.** Husband's conveyance of his interest in property jointly owned with wife, but on which they did not reside, was not fraudulent as to the wife, who thereafter secured a divorce on the ground of desertion and failure to provide notwithstanding Comp. Laws 1917, sections 2908, 2992, providing respectively, that exemption of homestead shall continue in favor of wife upon husband's desertion, and that husband cannot remove wife from homestead without her consent, without in good faith providing another homestead; such statutes having reference only to property on which the husband and wife reside. *Adamson v. Adamson*, 544.
9. **GRANTING OF ALIMONY DISCRETIONARY.** The granting or withholding of alimony is a matter within the sound discretion of the court. *Adamson v. Adamson*, 544.

**DOUBLE LIABILITY.** See "BANKS AND BANKING," "CONSTITUTIONAL LAW."

#### EASEMENTS.

1. **USE OF WORDS OF INHERITANCE IN CREATING EASEMENT APPURTENANT.** If the words "heirs and assigns" are used in making a reservation of easement where the grantor in fact retains no land that can be benefited by the easement, the use of the words does not create an easement appurtenant, the element of a dominant estate being lacking, and it is only an easement in gross; but if the deed reserving easement refers to no land of the grantor to which the easement can be appurtenant, but such land exists or existed, the fact of its existence may be established to give effect to the words used. *Ernst v. Allen*, 272.
2. **RESERVATION OF EASEMENT APPURTENANT WITHOUT DESCRIPTION OF RETAINED LAND.** Where the owner of a tract of land conveyed part of it, reserving to herself, her heirs and assigns, an equal right with the grantee, his heirs and assigns, to a right of way for vehicles, foot passengers, animals, etc., over a strip of land between that conveyed and that retained, the easement thus created was appurtenant to the retained land, though such retained land was not described by the conveyance. *Ernst v. Allen*, 272.
3. **"EASEMENT IN GROSS."** An "easement in gross" is a mere personal interest in the real estate of another, not assignable or inheritable, and being so exclusively personal that the owner cannot take another person in company with him (citing Words and Phrases, Easement in Gross). *Ernst v. Allen*, 272.
4. **"EASEMENT APPURTENANT."** An "easement appurtenant" or easement proper is a privilege which the owner of one tenement has the right to enjoy in respect to that tenement, in or over the tenement of another person, involving the idea of two distinct tenements, a dominant estate, to which the right is accessorial, and a servient estate, on which it is a burden or charge (citing Words and Phrases, Easement.) *Ernst v. Allen*, 272.

**EJUSDEM GENERIS.** See "INTOXICATING LIQUORS."

**EMINENT DOMAIN.**

**EXCLUSION OF INDUSTRIAL PLANTS FROM RESIDENCE DISTRICT NOT TAKING OF PROPERTY WITHOUT COMPENSATION.** Where the creation of a residence district would extend to the needs of the general public, the power to regulate or prohibit by ordinance the invasion of such a district by industrial plants ought not to be questioned on the ground that the exclusion of an industrial plant would be the taking of property for public use without just compensation. *Salt Lake City v. Western Foundry & Stove Repair Works*, 447.

**EMPLOYÉ.** See "MASTER AND SERVANT."

**EMPLOYER'S LIABILITY.** See "MASTER AND SERVANT."

**EVIDENCE.** See "FALSE PRETENSES."

1. **EXTRINSIC PROOF INADMISSIBLE TO DISCHARGE AGENT FROM PERSONAL LIABILITY.** In an action to recover from an officer of a gold mining company \$200 paid to him for stock, for which he receipted individually and without designation as such officer, extrinsic proof that he acted in an official capacity was not admissible to discharge him from liability. *Roe v. Schweitzer*.
2. **POSSESSION OF DEED CARRIES PRESUMPTION OF REGULARITY.** The possession of deed regular upon its face carries with it the presumption of regularity, even where not filed until after the death of the grantor. *In re Helin's Estate*, 572.
3. **JUDICIAL NOTICE.** It is a matter of common knowledge that it is lack of judgment, rather than want of knowledge, which minimizes both fear and caution in the young and inexperienced mind. *Groesbeck v. Lakeside Printing Co.*, 335.
4. **INFERENCE AGAINST PARTY FROM FAILURE TO REBUT ADVERSE EVIDENCE.** When a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, omission to do so furnishes a strong inference against him. *Cram et al. v. Reynolds*, 384.
5. **CONSTRUCTION OF AMBIGUOUS INSTRUMENT IN VIEW OF CIRCUMSTANCES AND SITUATION.** An instrument attempting to create an easement should be read in the light of surrounding circumstances, the situation of the parties, and property involved, where the language used is ambiguous and apparently contradictory. *Ernst v. Allen*, 272.
6. **WITNESSES COMPETENT TO TESTIFY REGARDING VALUE OF AUTOMOBILE.** Witnesses with experience in repairing and dealing in secondhand automobiles, and some of whom had previously negotiated with plaintiff with a view to buying his machine, held competent to testify regarding the value of plaintiff's automobile. *Cottam v. Oregon Short Line R. Co.*, 330.
7. **KNOWLEDGE BY PARTY TO PRIOR ACTION OF EFFECT OF JUDGMENT PRESUMED.** In mandamus to enforce an award of the Industrial



Commission against a city, the city, which was represented by counsel at all stages of the proceedings, is conclusively presumed to know which of two cases in the district court respecting the award was appealed, and that the judgment on appeal was final and conclusive. *Industrial Commission of Utah et al. v. Murray City et al.*, 525.

8. **ENTIRE CONVERSATION RELATING TO ACCORD AND SATISFACTION ADMISSIBLE.** In an action for breach of a contract to deliver lambs sold, wherein defendant alleged the making of a subsequent contract that only wether lambs born of his own herd were to be delivered, it was error to refuse to admit the entire conversation relating to such subsequent agreement, since if it had existed it would have been one of accord and satisfaction. *Armstrong v. Larsen*, 347.

**EXCEPTIONS.** See "APPEAL AND ERROR."

1. **DOCUMENTS SHOULD NOT BE ATTACHED TO BILL AFTER PREPARATION.** Documents purporting to extend the time to prepare and serve a bill of exceptions should not be attached to the bill after it has been prepared and presented for settlement. *Fisher v. Bonneville Hotel Co.*, 588.
2. **TIME FOR FILING WHERE NO NOTICE OF ENTRY OF JUDGMENT GIVEN STATED.** Where no notice in writing of the entry of judgment was served on defendant, defendant would have the whole of the six months period allowed for appeal, and perhaps longer under certain conditions, in which to prepare the bill of exceptions and procure settlement thereof, in view of Comp. Laws 1917, section 6969. *Fisher v. Bonneville Hotel Co.*, 588.

**EXECUTORS AND ADMINISTRATORS.**

1. **PAYMENT OF CLAIMS WITHOUT PRESENTATION NECESSITATES PROOF THAT THEY WERE JUST.** An administrator is entitled to credit for debts paid by him in good faith, on making satisfactory proof that they were justly due and that the amount paid was the true amount of the debt over all payments or set-offs, and that the estate is solvent, though no claim for such indebtedness was presented and allowed as provided by the Probate Code. *In re Hansen's Estate*, 23.
2. **PAYMENT OF CLAIMS WITHOUT ALLOWANCE PLACES BURDEN OF PROOF ON ADMINISTRATOR.** In paying claims without requiring their presentation and allowance, the administrator acts at his peril, and assumes the burden to prove all the facts required by Comp. Laws 1917, section 7750, to be proven to the satisfaction of the court. *In re Hansen's Estate*, 23.
3. **EVIDENCE INSUFFICIENT TO SHOW DECEASED WIFE OWNED STOCK AND SECURITIES.** Evidence held insufficient to show that a deceased wife was the owner of canal stock, or a note and mortgage, transferred by her husband, her administrator, by indorsement in his handwriting. *In re Hansen's Estate*, 23.
4. **PAYMENT OF TAXES GIVES RIGHT TO CREDIT.** A widower, administrator of his deceased wife's estate, interested in preserving it for himself and their children, acted within his rights in paying taxes out of his own funds, and is entitled to credit therefor,

with interest, on his final accounting, whether paid before or after his appointment. *In re Hansen's Estate*, 23.

5. IMPROVEMENTS ON REALTY SHOULD BE AUTHORIZED BY COURT. An executor or administrator should apply to the court for authority to make improvements on realty of decedent, and if he chooses to make them without first obtaining authority he assumes the burden clearly to prove the improvements were necessary and made in good faith. *In re Hansen's Estate*, 23.
6. WHAT REPAIRS AND IMPROVEMENTS GIVE RIGHT TO CREDIT. Under Comp. Laws 1917, sections 7718, 7739, a widower, administrator of his deceased wife's estate, *held* entitled to allowance on final accounting of any expenditures necessarily made in repairing houses, buildings, or fences existing at the death of his wife, though whether he should be allowed credit for new additions to the house, the erection of a barn, etc., was for the district court to determine, in view of the condition of the premises, etc. *In re Hansen's Estate*, 23.
7. WINDMILL NOT IMPROVEMENT ENTITLING ADMINISTRATOR TO CREDIT. A widower, administrator of his deceased wife's estate, on his final accounting as such, *held* not entitled to credit for the cost of erection of a windmill, an improvement of a temporary character, necessitated mainly for his own convenience while occupying the premises. *In re Hansen's Estate*, 23.
8. PREFERENTIAL RIGHT TO APPOINTMENT LOST BY DELAY. Petitioner lost the preferential right given by Comp. Laws 1917, section 7596, to letters of administration of his father's estate, where he failed to appear within three months, as required by section 7598, but delayed nearly twenty-five years in applying for appointment, and then filed a cross-petition, objecting to the appointment of decedent's married daughter as being disqualified according to section 7600. *In re Slater's Estate*, 252.
9. REVIEW OF DISCRETION IN APPOINTMENT. A son of deceased, by delay in applying for letters of administration having lost his preferential right of appointment given by Comp. Laws 1917, section 7596, the appointment of another who is competent will not be disturbed, where it does not appear that the court abused its discretion to his prejudice. *In re Slater's Estate*, 252.

#### EXECUTION.

1. POSSESSION OF JUDGMENT DEBTOR'S GRANTEE NOT PUTTING PURCHASER ON NOTICE. In action to quiet title, against a purchaser of land on execution sale and others, by the judgment debtor's grantee which did not record its conveyance until after the execution sale, evidence for plaintiff *held* insufficient to show possession on its part under its unrecorded conveyance so as to charge third parties or purchasers with notice or to put them on inquiry. *National Realty Sales Co. v. Ewing*, 438.
2. SALE NOT INVALIDATED BY INADEQUACY OF PRICE. Mere inadequacy of price was not sufficient to invalidate execution sale as against the judgment debtor's grantee, where the proceedings were fair and regular and there is nothing in the record to suggest fraud or concealment. *National Realty Sales Co. v. Ewing*, 438.

3. **SUBSEQUENT PURCHASER WITH NOTICE OF DEFECTS IN TITLE IS NOT PROTECTED.** A subsequent purchaser on execution sale cannot be protected as a bona fide purchaser if he had actual or constructive notice of an unrecorded title, ownership, or interest in the property at any time before payment of the purchase price. *National Realty Sales Co. v. Ewing*, 438.
4. **EQUITY WILL NOT AID JUDGMENT DEBTOR'S GRANTEE WHO STOOD BY ON SALE.** Equity will refuse its aid, in action to quiet title, to the grantee from a judgment debtor the day after judgment which did not record its conveyance until after sale of the land on execution, but stood by and permitted such sale with subsequent transfers of title in reliance upon it. *National Realty Sales Co. v. Ewing*, 438.
5. **CHARACTER OF POSSESSION TO IMPART NOTICE TO PURCHASER OF OCCUPANT'S TITLE.** Possession of realty, to impart notice of the occupant's title and equities to a purchaser on execution sale, must be open, notorious, visible, and continuous. *National Realty Sales Co. v. Ewing*, 438.

**EXPRESSIO UNIUS.** See "STATUTES."

**FALSE PRETENSES.**

1. **EVIDENCE INSUFFICIENT TO ESTABLISH CRIME.** In a prosecution for having obtained certain cattle by fraudulent and false pretenses, checks given therefor having been dishonored, evidence held insufficient to establish a violation of Comp. Laws 1917, section 8344, not showing any intent to cheat or defraud, nor any actual fraud, nor a fraudulent representation or false pretense to perpetrate the fraud, nor that the alleged fraudulent representation or pretense induced the owner to part with the cattle. *State v. Howd*, 527.
2. **OCCURRENCES AFTER OWNER PARTED WITH POSSESSION DO NOT SUSTAIN CHARGE.** What may have taken place between defendant and the owner of cattle after such owner had parted with them, by reason of which happenings the owner sustained pecuniary loss, could not support charge against defendant of having obtained the cattle by false pretenses. *State v. Howd*, 527.
3. **CONVICTION UNSUSTAINED BY UNCORROBORATED VERBAL TESTIMONY OF COMPLAINANT.** Under Comp. Laws 1917, section 8991, in a prosecution for having obtained cattle of another by false pretenses, the uncorroborated verbal testimony of the complaining witness was insufficient to sustain conviction. *State v. Howd*, 527.
4. **PROMISE TO PAY WITHOUT INTENTION OF PERFORMING NOT A "FALSE PRETENSE"—"FRAUDULENT REPRESENTATION."** The representation by the buyer of cattle that he would pay therefor on their arrival, though made without intention to pay, was not a "fraudulent representation" or "false pretense" in the legal acceptance of the terms. *State v. Howd*, 527.

**FORFEITURE OF PROPERTY.** See "INTOXICATING LIQUORS."

## FRAUDS, STATUTE OF.

RIGHT OF ALL CONCERNED TO WATER FILING MADE BY SINGLE PARTY UNDER ORAL AGREEMENT. Where plaintiffs complied with their part of an oral agreement as to the construction of an irrigation canal, paid over their pro rata share of the cost of a water filing made by a defendant, and did their full duty in constructing the canal, took their water through it, and, by a water master elected annually, in which election defendant participated, distributed to him his share of the water, as well as the shares of the other owners, plaintiffs are entitled to a decree adjudging them to be owners of the water filing made in the state engineer's office by defendant alone, and to decree quieting title thereto against defendant and his successors; the statute of frauds not being invocable to defeat plaintiffs' rights. *Bracken et al. v. Chaddburn*, 430.

## GIFTS.

TRUSTEE HOLDING GIFT FOR MINOR CANNOT CLAIM EXPENDITURE AT DONOR'S DIRECTION. If a gift was completed, the money at that time became the property of donee plaintiff, then a minor, and plaintiff's grandmother, donor, had no longer control over it after placing it with defendant as trustee, and defendant cannot defeat plaintiff's claim by attempting to show the money was expended by him at donor's direction. *Maltstrom v. Lund*, 353.

GUESTS. See "INNKEEPERS."

HEARSAY EVIDENCE. See "CRIMINAL LAW."

HEIRS AND ASSIGNS. See "EASEMENTS."

HIGHWAYS. See "COUNTIES."

1. LIABILITY OF TRACTION COMPANY FOR INJURIES DUE TO OBSTRUCTION. A traction company, which pursuant to an order of county officials removed from its track on a county road dirt and rock and dumped the same on the road at a place designated by the county officials, to be used for repair of an intersecting avenue, held not liable for injuries to a traveler due to obstruction caused by the materials, which had then been received and taken charge of by the county, in view of Comp. Laws 1907, section 511, subd. 24, as amended by Laws 1911, chapter 119, section 511x24, and Laws 1909, chapter 118, as to jurisdiction of county commissioners over county roads. *Shepard v. Utah Light & Traction Co.*, 186.
2. LIABILITY FOR OBSTRUCTION CAUSED BY LAWFUL ACT. While work performed on a public highway in an unlawful manner or for no lawful purpose cannot be justified although performed under direction of authorized officers, a lawful act performed in a lawful way cannot create a nuisance, and does not give rise to an action in tort. *Shepard v. Utah Light & Traction Co.*, 186.
3. PASSENGERS IN AUTOMOBILE NOT LIABLE FOR COLLISION. Passengers in an automobile with the owner thereof are not liable for

injuries to a motorcycle rider collided with, unless they were engaged in a joint enterprise with the owner of the car, or on their own part were negligent. *Fozley v. Gallegher*, 298.

**HOMESTEAD.** See "DIVORCE."

**RIGHT OF SURVIVING SPOUSE TO OCCUPY NOT LOST BY REMARRIAGE.** On death of the husband or wife, the surviving spouse, under Comp. Laws 1917, section 7643, is vested with the right of occupancy and use of the homestead, which continues until otherwise directed by the court, and is not lost merely by remarriage. *In re Hansen's Estate*, 23.

**HOMICIDE.** See "ASSAULT AND BATTERY," "CRIMINAL LAW."

**INFANTS—JUSTIFICATION FOR SLAYING CHILD.** Notwithstanding Comp. Laws 1917, sections 1829, 7915, a child between seven and fourteen years of age may violate the law and commit an offense against person or property the same as an adult person, and it cannot be said as a matter of law that such a child cannot be shot in defense of habitation, property, or person under section 8032, subd. 2. *State v. Terrell*, 314.

**HUSBAND AND WIFE.** See "DIVORCE."

**LOAN TO HUSBAND SECURED BY NOTE SIGNED BY WIFE AS SURETY, NOT A CHARGE ON HER ESTATE.** Where a husband borrowed money for his own use, and his wife signed the notes merely as surety, the husband, after his wife's death, when he was her administrator, in paying the notes merely paid his own debt, and cannot charge any portion thereof to the estate. *In re Hansen's Estate*, 23.

**IGNORANCE OF OWNER.** See "INTOXICATING LIQUORS."

**IMPROVEMENT ON REALTY.** See "EXECUTORS AND ADMINISTRATORS."

**IMPROPER CROSS-EXAMINATION.** See "WITNESSES."

**INDEPENDENT CONTRACTOR.** See "MASTER AND SERVANT."

1. **IMPROVEMENTS OF STREETS—BARRICADES—DUTY OF CONTRACTOR.** A contractor who rightfully enters upon a highway for the purpose of improving a street has a right to barricade and obstruct the public travel over the section of the street being improved. *Davis v. Mellen*, 9.
2. **ACCIDENTS ON STREETS—NEGLIGENCE—PROXIMATE CAUSE.** Although a contractor improving a city street was negligent in barricading the street and in providing a passageway, he was not liable for damages occasioned an automobilist driving through such passageway in the nighttime, due to the placing of wagons in the passageway by a third person in the nighttime, without the contractor's consent, leaving a passage too narrow for vehicles to pass each other, compelling plaintiff, upon suddenly meeting a speeding automobile in the narrow passage, to

turn into the barricade to avoid a collision, the contractor's negligence not being the proximate cause of injury received. *Davis v. Mellen*, 9.

3. **IMPROVEMENT OF STREETS—NEGLIGENCE.** A contractor improving a city street, who left a narrow passage for traffic, was not in duty bound to anticipate that during the night a third person would leave a loaded wagon in such passage, and cause damage to an automobilist during the night. *Davis v. Mellen*, 9.
4. **ACCIDENTS IN STREET—NEGLIGENCE OF CONTRACTOR.** That a contractor engaged in improving a street had agreed in his contract with the state road commission to provide "a competent watchman at all times to protect the work from traffic, or damages of any nature until traffic is admitted," did not render him negligent in failing to place a watchman on the work, as far as an automobilist, who ran into a barricade erected to warn the public that the street was closed to travel, was concerned. *Davis v. Mellen*, 9.
5. **IMPROVEMENT OF STREETS—LIGHTS—DUTY OF CONTRACTOR.** A contractor engaged in improving a city street must place suitable lights in the nighttime on barricades to warn the public of the presence of the barricade, and that the portion of the street closed and barricaded is not open to travel. *Davis v. Mellen*, 9.

#### INDICTMENT AND INFORMATION.

**EFFECT OF WITHDRAWING REASONS FOR NOT FILING INFORMATION.** Though, after transcript was transmitted to district court, district attorney filed a "statement of reasons in law for not filing information," where statement was withdrawn by permission of court, which immediately ordered district attorney to file an information, court properly refused to quash information on ground that district attorney "lost all further jurisdiction or right to proceed in the case unless ordered to do so by the court," under Comp. Laws 1917, section 8780. *State v. Overson*, 230.

#### INFANTS. See "HOMICIDE."

1. **NOTICE OF DELINQUENCY HEARING JURISDICTIONAL.** Service of notice under Comp. Laws 1917, section 1818, or voluntary appearance amounting to waiver, is necessary to confer jurisdiction on the juvenile court to determine right to custody of a delinquent child, but not to confer jurisdiction, pursuant to section 1815, to determine delinquency. *Jensen v. Hinckley*, 306.
2. **NO "WAIVER" OF NOTICE OF DELINQUENCY PROCEEDINGS BY APPEARANCE OF PARENT AS WITNESS.** The mother of a minor son, against whom a delinquency complaint had been filed in the juvenile court pursuant to Comp. Laws 1917, section 1815, and not served with notice thereof, as required by section 1818, held not to have waived service of notice by appearing in court merely as a witness; "waiver" being an intentional relinquishment of a known right. *Jensen v. Hinckley*, 306.

#### INNKEEPERS.

1. **WHO ARE "GUESTS" AT INN.** Any one away from home receiving accommodations at an inn as a traveler is a "guest," entitled to

hold the innkeeper responsible as such; hence the wife of a legislator, who had come to the capital city of the state during the session, is a guest in a hotel in which she and her husband were residing during his stay as a legislator, even though the room was rented by the month (citing Words and Phrases, Guest). *Fisher v. Bonneville Hotel Co.*, 588.

2. WIFE OF GUEST DEEMED GUEST, THOUGH SHE DID NOT REGISTER OR PAY FOR LODGING. Though the wife of a guest at a hotel, who rented a room by the month during his temporary stay in the city, did not register and paid no consideration, she is nevertheless a guest in the hotel, and entitled to protection as such, and the hotel is liable for loss of her baggage delivered to the hotel porter. *Fisher v. Bonneville Hotel Co.*, 588.
3. LIABILITY OF INNKEEPER AND BOARDING HOUSE KEEPER CONTRASTED. An innkeeper is an insurer of property committed to his care by a guest and is responsible for its loss, unless loss is caused by the act of God, the public enemy, or negligence of the guest himself; but, where the relation between the parties is that of boarder and boarding house keeper, the boarding house keeper is liable only for loss for failure to exercise ordinary care. *Fisher v. Bonneville Hotel Co.*, 588.

INSTRUCTIONS. See "CONTRACTS," "CRIMINAL LAW," "TRIAL."

#### INTOXICATING LIQUORS.

1. IN FORFEITURE PROCEEDINGS CREDIBILITY OF WITNESSES FOR JURY. In search, seizure, and forfeiture proceedings under the Prohibition Act, against certain intoxicating liquors, vessels, and an automobile used to transport them into the state, the credibility of the witnesses was peculiarly within the province of the district court, which was not bound by the statements of defendants, particularly where the inferences deducible from the undisputed facts were contrary to such statements. *State v. Jensen*, 50.
2. AUTOMOBILES IN ILLEGAL TRANSPORTATION FORFEITED TO STATE. The Prohibition Act confers upon the courts of Utah the power to declare forfeited to the state all automobiles used for the illegal transportation of intoxicating liquors. *State v. Jensen*, 50.
3. AUTOMOBILE ILLEGALLY TRANSPORTING LIQUOR SUBJECT TO FORFEITURE. In view of Comp. Laws 1917, section 5839, requiring the provisions of the Revised Statutes to be liberally construed, and the Prohibition Law, section 1, requiring liberal construction of the act, under Comp. Laws 1917, section 3359, an automobile used in the illegal transportation of liquor into Utah may be seized and forfeited as other things and other property may be forfeited in accordance with the various provisions of the Prohibition Law, the rule of ejusdem generis not applying in the construction of the section. *State v. Davis*, 54.
4. CLAIMANT OF SEIZED AUTOMOBILE MUST SHOW OWNERSHIP AND IGNORANCE OF USE. When intoxicating liquors have been found illegally in an automobile used for their transportation it is prima facie evidence that the car was being used illegally, and

one desiring to recover the car must establish by a preponderance of the evidence, not beyond a reasonable doubt, the fact of his ownership, and that he had no knowledge of the illegal use. *State v. Davis*, 54.

5. **CLAIM BY PARTIAL PAYMENT VENDOR OF AUTOMOBILE SUSTAINED.** Where an automobile is sold on installments, if the vendor or his assignee has no knowledge or information of the car's intended use in the illegal transportation of intoxicating liquors he is entitled to reclaim it when seized by the sheriff for forfeiture. *State v. Davis*, 54.
6. **ON SEIZURE OF STOLEN AUTOMOBILE OWNER MAY RECLAIM.** If an automobile is stolen and used by the thief for the illegal transportation of intoxicating liquors, in which enterprise it is seized by the sheriff and sought to be forfeited, the owner is entitled to reclaim it. *State v. Davis*, 54.

#### JUDGMENT.

1. **MUST BE BASED ON COMPLAINT STATING CAUSE OF ACTION.** In the absence of allegations essential and necessary to the statement of a cause of action, a judgment cannot be upheld. *Singh v. MacDonald*, 541.
2. **RELIEF TO BE CONSISTENT WITH RULES OF PRACTICE APPLICABLE TO PARTICULAR PROCEEDINGS.** Courts must proceed in an orderly manner, and the relief awarded in a given case must be such as is consistent with the rules of practice applicable to the proceedings in which the relief is sought. *Hamblyn v. State Board of Land Commissioners*, 402.

**JUDICIAL NOTICE.** See "CRIMINAL LAW," "EVIDENCE."

#### JURY.

1. **JURY TRIAL—WAIVER.** Where an intervenor in an action by board of education under Comp. Laws 1917, section 3753, for the use and benefit of a subcontractor against the principal contractor and his surety, did not demand a jury within time fixed by section 6782 for trial of the issues between himself and the general contractor, *held* that, where those issues were distinct from the rest of the case, intervenor's legal right to a jury was waived. *Board of Education of Salt Lake City v. West*, 357.
2. **STATUTORY ACTION FOR USE OF SUBCONTRACTOR ONE AT LAW.** An action by board of education under Comp. Laws 1917, section 3753, for use and benefit of a subcontractor against the principal contractor and his surety, is one at law triable by jury. *Board of Education of Salt Lake City v. West*, 357.
3. **DENIAL OF JURY TRIAL AFTER FAILURE TO DEMAND NOT ABUSE OF DISCRETION.** Where intervenor did not request a jury trial in accordance with Comp. Laws 1917, section 6782, so as to be entitled thereto as a matter of right, *held* that, though the trial court might have exercised its legal discretion by ordering a jury trial on intervenor's application thereafter made upon his showing a satisfactory excuse for failure to make timely application, the denial of intervenor's application for jury trial cannot be



treated as an abuse of discretion, where there was no showing as to excuse for failure to make timely application. *Board of Education of Salt Lake City v. West*, 357.

JUSTIFICATION OF ASSAULT. See "ASSAULT AND BATTERY."

#### LANDLORD AND TENANT.

1. EVIDENCE OF ORIGIN OF FIRE COMPETENT IN ACTION BY TENANT AGAINST LANDLORD FOR INJURIES IN BURNING BUILDING. In a tenant's action against his landlord for personal injuries due to a fire alleged to have occurred through the landlord's negligence, evidence respecting the condition of the building after the fire held competent on the issue as to the location of the fire and as tending to locate the place where the fire originated; one of the grounds of negligence being that the fire was caused by the close proximity of a furnace pipe to a wooden floor. *Wilcox v. Jamison et al.*, 535.
2. KNOWLEDGE OF LANDLORD OF ORDINANCE REQUIRING FIRE ESCAPES HELD IMMATERIAL IN TENANT'S ACTION FOR INJURIES. In a tenant's action against a landlord for personal injuries due to a fire alleged to have occurred because of defendant's negligence in maintaining a furnace pipe in close proximity to a wooden floor, it was not error to exclude evidence by defendants that they had no knowledge of the existence of an ordinance requiring the building to be equipped with fire escapes and that they had not been notified that they were required to construct fire escapes; the personal knowledge of defendants as to the existence of the ordinance being immaterial. *Wilcox v. Jamison et al.*, 535.
3. TENANT HELD NOT NEGLIGENT IN CHOOSING BETWEEN HAZARDOUS WAYS OF ESCAPE FROM BURNING BUILDING. In a tenant's action for personal injuries due to a fire caused by the close proximity of a furnace pipe to a wooden floor, that the tenant upon discovering the fire and finding the main hallway full of smoke endeavored to escape by the back stairs, but being unable to gain access to them returned to her apartment, where she was overcome by heat, did not constitute contributory negligence, since one compelled instantly to choose between two hazards is not negligent if he makes a choice a person of ordinary prudence would have made, although injury results therefrom. *Wilcox v. Jamison et al.*, 535.
4. LANDLORD LIABLE FOR FAILURE TO OBEY ORDINANCE REQUIRING FIRE ESCAPE. In tenant's action against a landlord for personal injuries due to a fire in the building, an instruction that, if the landlord violated the ordinance requiring buildings to be equipped with fire escapes and that such violation by itself or in connection with other acts of negligence on his part was the proximate cause of the injuries, then in case the jury found that such injury was not contributed to by plaintiff's negligence plaintiff was entitled to recover, was correct. *Wilcox v. Jamison et al.*, 535.
5. LANDLORD AND TENANT—CONTRIBUTORY NEGLIGENCE OF TENANT ESCAPING FROM BURNING BUILDING HELD QUESTION OF FACT. In a tenant's action against a landlord for personal injuries sus-

tained in a fire alleged to have been caused by the landlord's negligence in maintaining a furnace pipe in close proximity to a wooden floor, evidence *held* to make the question of plaintiff's contributory negligence in endeavoring to escape one for the jury. *Wilcox v. Jamison et al.*, 535.

#### LIMITATIONS OF ACTIONS.

1. **CONTRACTS TO SHORTEN PERIOD VALID.** Parties to a contract may stipulate for a period of limitations shorter than that fixed by the statute of limitations. *Clark et al. v. Lund*, 284.
2. **SIX-YEAR STATUTE APPLICABLE TO BREACH OF WARRANTIES IN SALE.** An action *held* based on an alleged breach of contract of warranty and governed by the six-year statute of limitations, and not Comp. Laws 1917, section 6468, prescribing three years as the period for the commencement of action for relief on the ground of fraud; although it was alleged in the complaint that representations and warranties in the agreement were false and untrue. *Clark et al. v. Lund*, 284.

**LUMP SUM SETTLEMENT.** See "MASTER AND SERVANT."

#### MALICIOUS PROSECUTION.

**ALLEGATION THAT DEFENDANT DID NOT USE "DUE CARE" TO ASCERTAIN FACTS HELD INSUFFICIENT.** In an action for malicious prosecution, an allegation that defendant did not use due care to ascertain whether or not a check was forged, or genuine, was not equivalent to an allegation that the prosecution was instituted without probable cause and was insufficient to state a cause of action. *Singh v. MacDonald*, 541.

#### MANDAMUS.

1. **RIGHT TO HAVE ACT PERFORMED MUST BE CLEAR.** Where public officers are sought to be coerced by a writ of mandate to do certain acts, the right of the plaintiff to have the acts performed must be clear, and the corresponding duty upon the officer to do the required act must be correspondingly clear. *Woodcock v. Board of Education of Salt Lake City*, 458.
2. **INJURED EMPLOYÉ MAY PERSONALLY MAINTAIN MANDAMUS TO COMPEL PAYMENT OF COMPENSATION UNDER WORKMEN'S COMPENSATION ACT.** A school teacher who was awarded compensation for personal injuries by the Industrial Commission may sue in mandamus in her own name to compel the school board to pay the compensation awarded; Comp. Laws 1917, section 3130, providing that such an action could be brought in the name of the state, providing only a cumulative remedy. *Woodcock v. Board of Education of Salt Lake City*, 458.
3. **WILL LIE TO COMPEL DISTRICT JUDGE TO BRING CAUSE TO TRIAL.** Mandamus will lie to compel a district judge to take steps necessary to bring a cause to trial, where he has improperly suspended proceedings by reason of plaintiff's failure to pay costs of a prior action, under Comp. Laws 1917, sections 7391. 7392. *Peterson v. Evans, Judge*, 505.

4. **ISSUANCE OF CERTIFICATE OF SALE TO OCCUPANT OF SCHOOL LAND NOT AN IMPERATIVE DUTY.** Under Comp. Laws 1917, section 7391, writ of mandamus will not be granted to compel State Board of Land Commissioners to issue certificate of sale to occupant of school land claiming under original settler and applying therefor under section 5588, providing that such occupant "may be permitted to purchase such lands," the issuance of the certificate not being an imperative duty. *Hamblin v. State Board of Land Commissioners*, 402.
5. **SCHOOL BOARD MAY BE REQUIRED TO PAY COMPENSATION TO INJURED TEACHER IN ABSENCE OF SPECIAL APPROPRIATION.** Mandamus will lie against a school board to compel payment of compensation awarded under the Workmen's Compensation Act if the board has sufficient money in the support and maintenance school fund to pay the claim, although the board has not made a special appropriation for the payment of compensation. *Woodcock v. Board of Education of Salt Lake City*, 458.
6. **DENIAL OF JURY IN ACTION TO SET ASIDE AWARD NO DEFENSE AGAINST MANDAMUS TO ENFORCE AWARD SET ASIDE BY JUDGE, BUT REINSTATED ON APPEAL.** In mandamus to enforce an award of the Industrial Commission against a city, the city cannot complain that in its action to set aside the award it was denied a jury trial, where the trial court granted the relief prayed for, but it was reversed on appeal. *Industrial Commission of Utah et al. v. Murray City et al.*, 525.
7. **ORDER FOR PAYMENT OF MONEY BY CITY SUSPENDED BECAUSE OF INABILITY TO PAY UNTIL FOLLOWING YEAR.** Where a city has no money with which to pay an award of the Industrial Commission, and its resources for the current year had been exhausted, a writ of mandamus will be held in suspense until the expiration of that year. *Industrial Commission of Utah et al. v. Murray City et al.*, 525.
8. **WILL NOT LIE TO COMPEL OFFICER TO MAKE PAYMENT IN ABSENCE OF FUNDS.** While a public officer or board may by mandamus be coerced to pay a particular claim, in order to obtain a peremptory writ for payment, it must be alleged and, if denied, proved that such officer or board has funds with which to pay that particular claim. *Woodcock v. Board of Education of Salt Lake City et al.*, 458.
9. **PARTY BENEFICIALLY INTERESTED MAY MAINTAIN.** Mandamus is a special proceeding which the party beneficially interested may always institute and maintain in his own name and behalf. *Woodcock v. Board of Education of Salt Lake City et al.*, 458.

#### MASTER AND SERVANT.

1. **"INDEPENDENT CONTRACTOR" DEFINED.** An "independent contractor" is one working for another who has no control as to the means by which the work is accomplished; an independent contractor not being subject to control except as to the result of the work (citing Words and Phrases, Second Series, Independent Contractor). *Stricker et al. v. Industrial Commission of Utah et al.*, 603.

2. **QUARRY WORKMAN HELD TO BE INDEPENDENT CONTRACTOR EXCLUDED FROM COMPENSATION ACT.** Where persons engaged by the owner of a quarry to quarry rock at a stipulated price per ton engaged deceased and another to drill the holes, load and shoot the same, deceased and his associate to be paid according to the depth of the holes, deceased must be deemed an independent contractor, and not an employ   either of the owner or of the contractors engaged to quarry the rock, it appearing that deceased and his associate were subjected to no supervision, and that the contract with the owner provided that it should not assume any responsibility in connection with the work, and hence there could be no award under the Workmen's Compensation Act either against the independent contractor or the owner for deceased's death; there being nothing to impeach the bona fides of the contracts. *Stricker et al. v. Industrial Commission of Utah et al.*, 603.
3. **COMPENSATION ACT DEFINITION ADDS NOTHING TO DEFINITION OF "EMPLOY  ."** Comp. Laws 1917, section 3111, defining an "employ  ," adds nothing to the generally accepted definition of "employ  ," which is one who works for and under control of another for hire (citing Words and Phrases, Second Series, Employ  ). *Stricker et al. v. Industrial Commission of Utah*, 603.
4. **COMPENSATION FOR INJURIES TO TEACHER UNDER WORKMEN'S COMPENSATION ACT PAYABLE OUT OF "SUPPORT AND MAINTENANCE" FUND.** Under Workmen's Compensation Act a school board is liable to an injured teacher for an amount awarded to her as compensation by the Industrial Commission, and such amount is payable out of the funds that are raised by taxation for the support and maintenance of the schools; the term "support and maintenance" under Comp. Laws 1917, section 4704, being ample in scope and meaning to cover compensation provided for in the act, where the school district has not contributed to the state insurance fund. *Woodcock v. Board of Education of Salt Lake City*, 458.
5. **EMPLOYER MUST WARN MINOR OPERATING MACHINERY.** Owners of machinery, who employ minors to operate the machinery, must see to it that the minors are properly instructed and cautioned with respect to all the dangers that are necessarily incident to the operation of such machinery. *Groesbeck v. Lakeside Printing Co.*, 335.
6. **FAILURE OF COMPENSATION ACT TO PROVIDE HOW FUNDS SHALL BE RAISED DOES NOT RELIEVE SCHOOL DISTRICTS FROM PAYING COMPENSATION FOR INJURY TO TEACHER.** While the Workmen's Compensation Act merely requires school districts to pay compensation, and does not provide how the fund to pay the compensation shall be raised, yet that, standing alone, would not necessarily relieve a school district from the power or duty of paying compensation awarded, nor would the fact that the school funds partake of the nature of trust funds. *Woodcock v. Board of Education of Salt Lake City*, 458.
7. **EVIDENCE SHOWING INJURY TO THIRD PERSON BY SERVANT'S NEGLIGENCE IN HIS EMPLOYMENT.** In an action by a plate glass insurer to recover from a garage keeper damages to the front of a hotel caused by backing an auto bus from the garage into it, evidence

held to sustain finding that defendant, "by his servants and employes acting within the scope of employment, committed the injuries complained of." *N. Y. Plate Glass Ins. Co. v. Martines*, 292.

8. MISLEADING INSTRUCTION ON RES IPSA LOQUITUR. In an employe's action for injuries, a requested instruction that no negligence is to be presumed because of the happening of the accident held properly refused as misleading, in that jury might have misunderstood the term "accident" to refer to the accident with all attendant circumstances described by the witnesses. *Vallottis v. Utah-Apex Mining Co.*, 151.
9. WORKMEN'S COMPENSATION ACT—FINDINGS OF COMMISSION—EVIDENCE OF INJURY—SUFFICIENCY. Findings of the Industrial Commission that a city employe petitioning for compensation was injured in the course of his employment, and that his injury by a slight blow on the neck with a shovel handle was the immediate cause of a paralytic stroke following shortly after the accident held supported by evidence given by the attending physician. *Murray City v. Ind Com.*, 44.
10. EMPLOYER PROCURING INSURANCE PROVIDED FOR BY WORKMEN'S COMPENSATION ACT NOT RELEASED FROM LIABILITY. Under Comp. Laws 1917, sections 3113, 3114, 3116-3119, and sections 3126 and 3134, the employer is primarily liable for compensation to an employe, and the fact that the employer has complied with section 3114 by insuring payment of compensation does not relieve the employer where the insurer is insolvent; default of either employer or insurer not excusing payment by the other. *American Fuel Co. of Utah v. Industrial Commission of Utah*, 483.
11. OWNERSHIP OF AUTOMOBILE DOES NOT ESTABLISH LIABILITY. The mere fact of ownership of an automobile will not establish liability of the owner for injuries resulting from negligent operation by one to whom the owner has lent the car, something more than ownership being required to establish agency or the relation of master and servant between the owner and a borrower or negligent operator. *N. Y. Plate Glass Ins. Co. v. Martines*, 292.
12. EMPLOYE ON CO-OPERATIVE THRESHING MACHINE "AGRICULTURAL LABORER" WITHIN WORKMEN'S COMPENSATION ACT. Where a number of farmers purchased a threshing machine for the purpose of threshing their own grain and used it principally for that purpose, such primary purpose is controlling, and so one employed to assist in threshing operations is an agricultural laborer within the Workmen's Compensation Act, even though grain of others than the owners of the machine was threshed. *Jones et al. v. Industrial Commission of Utah*, 489.
13. WORKMEN'S COMPENSATION—ARISING OUT OF EMPLOYMENT INCLUDES DOG BITE. Where an employe on his way from his residence to a garage to get his employer's automobile, used in making deliveries, was bitten by a dog while making delivery of meat for his employer, which was undelivered the evening before the injury arose "out of the employment" within Comp. Laws 1917, section 3122, allowing compensation for injuries by accident arising out of and in course of the employment. *Chandler v. Industrial Com.*, 213.

14. **WORKMEN'S COMPENSATION ACT MUST BE LIBERALLY CONSTRUED.** The rule that Employers' Liability Act, providing for compensation for injuries, should be liberally construed, which is also the rule prescribed by Comp. Laws 1917, section 5839, applies especially to the phrase "out of and in the course of the employment." *Chandler v. Industrial Com.*, 213.
15. **WORKMEN'S COMPENSATION—DOUBT RESOLVED IN FAVOR OF CLAIMANT.** Any doubt respecting right to compensation should be resolved in favor of the claimant. *Chandler v. Industrial Com.*, 213.
16. **NEGLIGENCE IN FAILING TO WARN YOUTHFUL INEXPERIENCED EMPLOYÉ JURY QUESTION.** In action for injuries to inexperienced fourteen year old job press feeder, where there was evidence that both acting foreman, who employed him, and the general foreman, observed that he was not an experienced or skilled press feeder, whether it was negligence not to instruct or warn him as to the danger of the work held for jury. *Groesbeck v. Lakeside Printing Co.*, 335.
17. **NEGLIGENCE OF MINOR EMPLOYÉ PRECLUDES RECOVERY FOR INJURIES.** The law does not permit a minor servant to escape the consequences of his own negligence, where it is clear that he did know and appreciate, or must have known and appreciated the danger. *Groesbeck v. Lakeside Printing Co.*, 335.
18. **APPRECIATION OF DANGER BY MINOR EMPLOYÉ JURY QUESTION.** Where it is not clear from all the facts and circumstances, including the age and experience of minor employé, whether he ought to have known and appreciated the danger of the work he was doing, the question of whether he did appreciate the danger is one of fact for the jury and not of law for the court. *Groesbeck v. Lakeside Printing Co.*, 335.
19. **CONTRIBUTORY NEGLIGENCE OF INEXPERIENCED JOB PRESS FEEDER FOR JURY.** Whether inexperienced fourteen year old job press feeder operating a "rocker tail" job press was contributorily negligent in placing his hands between the upper edge of the rocker tail and the crank shaft, for purpose of rescuing a slip which had been printed and which he had been instructed not to spoil or lose, held for the jury under the evidence. *Groesbeck v. Lakeside Printing Co.*, 335.
20. **ADMISSIBILITY OF EVIDENCE IN ACTION FOR INJURIES.** In action for injuries to an employé from a loose rung in a ladder, evidence of the hoisting of heavy timbers which sometimes swung against ladder and loosened rungs was admissible to show the cause of the defect and necessity of frequent inspection by employer. *Vallotis v. Utah-Apex Mining Co.*, 151.
21. **NOTICE OF DEFECT IN LADDER AS JURY QUESTION.** In action for injuries to employé from a loose rung in a ladder, where defense was that employé had slipped off a secure rung and that employer had no notice of the defect, held, under the evidence, that the case was for the jury. *Vallotis v. Utah-Apex Mining Co.*, 151.
22. **WORKMEN'S COMPENSATION—APPROVAL BY DISTRICT COURT OF LUMP SUM SETTLEMENT.** In view of Comp. Laws 1917, section

3146, of the Workmen's Compensation Act, order of the district court, authorizing the guardian of an injured employé, rendered insane by the accident, to make a commuted or lump sum settlement with the employer, and to execute a release, *held* not even prima facie evidence of the reasonableness of the settlement, which, even in the absence of contrary evidence, the Industrial Commission was not under duty to approve, it not being within the authority of the district court to direct the guardian with respect to the amount of the compensation to be received, or when and how it should be received; such matters being within the control of the Industrial Commission. *Reteuna v. Industrial Commission*, 258.

23. WORKMEN'S COMPENSATION—REVIEW OF COMMISSION'S DETERMINATION OF FACT. Where there was testimony to support the conclusion of the Industrial Commission on a question of fact, the Supreme Court will not review the commission's finding. *Reteuna v. Industrial Commission*, 258.
24. WORKMEN'S COMPENSATION—DENIAL OF COMMUTED COMPENSATION. Refusal by the Industrial Commission to approve a commuted or lump sum settlement with an injured employé rendered insane by the accident, in view of the possibility that the employé might recover, etc., *held* not arbitrary and unlawful. *Reteuna v. Industrial Commission*, 258.
25. WORKMEN'S COMPENSATION—REVIEW OF DETERMINATION OF COMMISSION AS TO COMMUTATION. In view of the objects of the Workmen's Compensation Act, embracing the protection of society as well as the protection of the injured employé or his dependents, the authority and discretion of the Industrial Commission, as the authorized agent of the state, in determining whether the interests of the parties would be subserved best by commutation of compensation or payment in a lump sum pursuant to Comp. Laws 1917, section 3145, is absolute, and not subject to review by the courts. *Reteuna v. Industrial Commission*, 258.
26. WORKMEN'S COMPENSATION ACT CONSTITUTIONAL. The constitutional right of the Legislature to enact a workmen's compensation law, having not only the object to secure compensation to an injured employé, or those dependent upon one killed by accident, but to relieve society of the care and support of the victims of industrial accidents, is not open to question. *Reteuna v. Industrial Commission*, 258.
27. COMPENSATION UNDER WORKMEN'S COMPENSATION ACT NOT DAMAGES BUT SALARY. Compensation awarded under the Workmen's Compensation Act is not damages for injuries sustained, but is compensation pure and simple, being merely another term for salary or wages. *Woodcock v. Board of Education*, 458.

MISCONDUCT OF PROSECUTING ATTORNEY. See "CRIMINAL LAW."

MUNICIPAL CORPORATIONS. See "EMINENT DOMAIN."

1. CREATING RESIDENCE DISTRICT AND PROHIBITING OPERATION OF FOUNDRY NO VIOLATION OF ORGANIC LAW. An ordinance of a city,

creating a residence district under Comp. Laws 1917, sections 570x69, 570x70, 570x87, and prohibiting the operation of foundries, etc., therein, does not violate any rights guaranteed by the organic law of the state. *Salt Lake City v. Western Foundry & Stove Repair Works*, 447.

2. **CONSTITUTIONAL LIMIT OF INDEBTEDNESS DOES NOT PROHIBIT PAYMENT AFTER EXPIRATION OF YEAR.** Const. art. 14, section 3, limiting indebtedness of municipal corporations, inhibits only the creation of indebtedness in excess of the revenue for the current year, and does not relate to the time of payment, and if the amount of the indebtedness is limited to the revenue of the current year, there is no objection to providing for payment after the year expires. *Muir v. Murray City*, 368.
3. **MUNICIPAL POWER LINES MAY BE CONSTRUCTED BEYOND BOUNDARY FOR PURPOSE OF SELLING SURPLUS POWER.** Under Comp. Laws 1917, section 570x2, a city has the power to establish an electric light plant and transmission lines and provide for the proper necessities of a rapidly increasing population, and where it has a large surplus of power it may legitimately run a transmission line beyond its boundaries to a nearby city and sell such surplus power. *Muir v. Murray City*, 368.
4. **WORD "TAXES," IN CONSTITUTION, LIMITING INDEBTEDNESS, CONSTRUED TO MEAN REVENUE.** Although Const. art. 14, section 3, provides that no debt in excess of "taxes" for the current year shall be created by any county or subdivision thereof, the word "revenue" conveys the meaning intended, and the limit of indebtedness of a municipal corporation is not exceeded unless in excess of the potential revenues for the current year, from whatever source obtainable. *Muir v. Murray City*, 368.
5. **ULTRA VIRES NOT DEFENSE TO ACTION TO RECOVER LOAN FOR CORPORATE PURPOSE.** Where money was borrowed for a corporate purpose, and was profitably and judicially expended, and the city and its inhabitants derived substantial benefits therefrom, and continue to derive benefits, the city will not be permitted, under the plea of ultra vires, to escape liability, although the transaction was not in all respects regular and in strict accordance with law. *Muir v. Murray City*, 368.
6. **ULTRA VIRES ACTS IN BORROWING MONEY NOT VALIDATED, BECAUSE PROFITABLE.** Where a municipal corporation exceeds its powers and borrows money, the fact that the illegal exercise of the power resulted in a profitable investment would be no answer to the defense of ultra vires, for cities are not organized primarily for the purpose of engaging in commercial enterprises, however profitable they may appear, or even prove to be. *Muir v. Murray City*, 368.
7. **PAYMENT FOR STREET PAVING.** A municipality under Comp. Laws 1917, section 570x8, has authority to order a street paved under an arrangement that the municipality should bear one-third of the expense, the county the remainder, and to pay its share of the expense out of the two-mill tax, levy of which is authorized by section 671, subd. 3; the provisions in sections 674 and 675 for special assessments for local improvements as streets not being exclusive. *Booth v. Midvale City*, 220.



8. **ALL VEHICLES HAVE EQUAL RIGHTS ON STREETS.** Comp. Laws 1917, sections 3978, 3985, are merely declaratory of the law of the road; and, in the absence of a regulating ordinance, all vehicles including automobiles and bicycles, have equal rights on the streets. *Richards v. Palace Laundry Co.*, 409.
9. **LIABILITY FOR INJURY TO BICYCLE RIDER ON WRONG SIDE OF STREET.** Though when street or highway is not used by others one may drive on any part thereof, yet, when a traveler on bicycle passes from the right to the left of the center of the street he loses some of his rights, and may not be heard to complain of the conduct of those who are on the proper side of the street to the same extent as though he also were on the proper side. *Richards v. Palace Laundry Co.*, 409.
10. **CARE OF AUTO DRIVER APPROACHING INTERSECTION.** A greater degree of care is required of driver of automobile in approaching intersections than between street crossings. *Richards v. Palace Laundry Co.*, 409.
11. **DRIVER OF AUTOMOBILE MAY ASSUME THAT ONE APPROACHING ON BICYCLE FROM OPPOSITE DIRECTION WILL CONTINUE ON PROPER SIDE OF STREET.** Where one operating his vehicle on proper side of the street makes a survey of condition of the street ahead and observes no one coming on his side of the street, but sees one coming toward him on the opposite side of the street, he may assume that such person will continue on the opposite side. *Richards v. Palace Laundry Co.*, 409.
12. **DRIVER OF AUTOMOBILE MUST EXERCISE "ORDINARY AND REASONABLE CARE."** The care and vigilance required of one operating an automobile on city streets must always measure up to the standard required by law, which is to exercise "ordinary and reasonable care," which is that degree of care which the circumstances and surroundings require and which is commensurate with the danger that may be encountered. *Richards v. Palace Laundry Co.*, 409.
13. **DRIVER OF AUTOTRUCK NOT REQUIRED TO MAINTAIN LOOKOUT FOR VEHICLES ON OPPOSITE SIDE OF STREETS.** Driver of defendant's autotruck on proper side of street (Comp. Laws 1917, section 3978), and not on or near a crossing, could relax his vigilance, and was not bound to maintain a constant lookout for any one approaching on the opposite side of the street. *Richards v. Palace Laundry Co.*, 409.
14. **ACTS OF NEGLIGENCE OF AUTOMOBILE DRIVER NOT PLEADED CANNOT BE PROVEN.** In action for injuries due to plaintiff being thrown from his bicycle in front of defendant's approaching autotruck, no act of negligence not charged could be legally proven. *Richards v. Palace Laundry Co.*, 409.
15. **CITY HAD AUTHORITY TO CREATE RESIDENCE DISTRICT.** Under Comp. Laws 1917, sections 570x69, 570x70, 570x87, a city had the right to exclude foundries from a particular section of the city, in good faith created a residence district, although there were other sections in the city, where the conditions were similar in character, which were unaffected by the ordinance establishing the district. *Salt Lake City v. Western Foundry & Stove Repair Works*, 447.

**NEGLIGENCE.** See "INDEPENDENT CONTRACTOR," "MASTER AND SERVANT," "MUNICIPAL CORPORATION."

**PRESUMPTION THAT PERILOUS CONDITION WHICH OUGHT TO HAVE BEEN DISCOVERED WAS DISCOVERED.** Where one owing duty to maintain a lookout could in the exercise of ordinary care and vigilance have discovered the perilous situation of plaintiff in time to have averted injury, the law presumes that he saw what he ought to have seen, and actual discovery is not necessary. *Richards v. Palace Laundry Co.*, 409.

#### NEW TRIAL.

1. **INSUFFICIENCY OF EVIDENCE.** In action for injuries to employé from loose rung in ladder where defense was that employé had slipped off a secure rung and that employer had no notice of defective rung, court did not abuse its discretion in overruling motion for new trial because of insufficiency of evidence, where evidence was conflicting and subject to different inferences and presented a case of the credibility of witnesses. *Vallotis v. Utah-Apex Mining Co.*, 151.
2. **VERDICT PALPABLY AGAINST WEIGHT OF EVIDENCE.** Trial judge should set aside verdict for insufficiency of evidence whenever in his judgment the verdict is clearly and palpably against the weight of the evidence, but generally ought not, in view of Comp. Laws 1907, section 3478 (Comp. Laws 1917, section 7208), disturb verdict if in his opinion there is substantial evidence to support it, since to so do would be to invade province of jury. *Vallotis v. Utah-Apex Mining Co.*, 151.
3. **COURT MAY GRANT EXTENSION OF TIME TO CONSENT TO REMISSION OF DAMAGES.** Where court ordered "that a new trial be granted unless the plaintiff, within twenty days from date, consents to a remission of the verdict in the sum of \$2,000," it could, in its discretion, extend the time within which plaintiff might make an election, under Comp. Laws 1917, section 7023. *Harris v. Speirs*, 474.
4. **PLAINTIFF, ELECTING TO REMIT DAMAGES UNDER CONDITIONAL ORDER GRANTING NEW TRIAL, MUST GIVE NOTICE TO COURT AND DEFENDANT.** Where court denies a new trial, except on the ground of excessive damages, and orders a new trial, unless a remission of a certain amount of damages is made within a certain time, plaintiff, if electing to remit damages, must make the election known both to the court and to the defendant. *Harris v. Speirs*, 474.
5. **EXTENSION OF TIME TO ELECT AS TO GRANT OF NEW TRIAL ON CONDITION OF REMITTITUR PROPER.** Where court denied a new trial except on the ground of excessiveness of damages, ordering that new trial be granted unless within twenty days the plaintiff remit a certain amount of the damages, and plaintiff failed to elect within the twenty days, and the order became absolute, the court thereafter could extend the time for making the election, under Comp. Laws 1917, section 6619, where the failure to elect was due to inadvertence and excusable neglect. *Harris v. Speirs*, 474.
6. **COURT MAY MAKE ORDER CONDITIONAL ON REMISSION OF PART OF DAMAGES.** In an action for damages, where court grants a mo-

tion for new trial on the ground that the judgment is excessive, it may, in its discretion, provide that no new trial will be allowed, if within a certain time the plaintiff shall consent to remission of a certain portion of the damages. *Harris v. Speirs*, 474.

7. COURT MAY PERMIT PLAINTIFF TO REMIT IN COMPLIANCE WITH CONDITIONAL ORDER THOUGH ORDER HAD BEEN MADE ABSOLUTE. Where court denied motion for new trial, except on ground of excessiveness of damages, and ordered a new trial, unless plaintiff remit a certain amount of damages within twenty days, and at the end of twenty days ruled that the conditional order had become absolute, the court could thereafter permit plaintiff to remit, under Comp. Laws 1917, section 6619, where it entered the order, declaring the former order absolute, inadvertently, without considering the merits of plaintiff's application for an order denying the motion for a new trial upon the grounds of excusable neglect and inadvertence. *Harris v. Speirs*, 474.
8. VERDICT MAY BE SET ASIDE BY COURT ON OWN MOTION. Under Comp. Laws Utah 1917, section 6983, in an action against several defendants, where the court considered the evidence against some of the defendants insufficient to sustain verdict against them, it should have set the verdict aside of its own motion. *Fozley v. Gallegher*, 298.

NOTICE TO PURCHASER. See "EXECUTION."

OBSTRUCTING HIGHWAY. See "COUNTIES," "HIGHWAYS."

#### PARENT AND CHILD.

1. RIGHT TO CUSTODY. Other things equal, the natural parent of a child is entitled to its care, custody, and control, but may by agreement or conduct deprive himself of his natural right to confer it upon others; the guiding principle always being the best interests of the child for the present and future. *Farmer v. Christensen*, 1.
2. SAME. Divorced father of boy living with his maternal grandmother and his mother's second husband held entitled to the custody of the boy in order that he might be adopted by his father's sister and her husband, fit persons by character and means, and anxious to have the child, despite a strong affection between the boy and his stepfather and grandmother. *Farmer v. Christensen*, 1.

PASSENGERS. See "CARRIERS."

#### PLEADING.

1. CREDITORS' BILL NOT MULTIFARIOUS. A complaint, in effect a creditors' bill after exhaustion of legal remedies, seeking to force a creditor's lien on debtor's property and to follow assets of the debtor corporation into the hands of all who are not bona fide purchasers, the facts stated relating wholly to the same general cause of action, is not multifarious, and not subject to demurrer for improperly uniting or mingling causes of action,

which should be separately stated. *Hoggan v. Price River Irr. Co. et al.*, 170.

2. **WAIVER OF DEFECT.** In action in claim and delivery where complaint was defective in failing to plead plaintiff's right to possession, defendant by tendering requested instructions relating to the right of possession, and by permitting court without objection or exception to give other instructions relating to possession waived such defect. *Bush v. Bush et ux.*, 237.
3. **ALLEGATIONS OF COMPLAINT.** Complaint, in order to state cause of action, must state facts which, if true, will entitle plaintiff to legal or equitable relief. *Bush v. Bush et ux.*, 237.
4. **ANSWER SUFFICIENT TO RAISE ISSUE OF POSSESSION.** In action in claim and delivery where complaint was defective in failing to plead plaintiff's right of possession, answer held not to waive defect. *Bush v. Bush et ux.*, 237.
5. **COMPLAINT MUST ALLEGE ULTIMATE FACT.** In pleading a cause of action, ultimate fact must be stated. *Bush v. Bush et ux.*, 237.

**PREFERENTIAL RIGHT.** See "EXECUTORS AND ADMINISTRATORS," "PUBLIC LANDS."

**PRELIMINARY EXAMINATION.** See "CRIMINAL LAW."

**PREMATURE APPEAL.** See "COURTS," "PROHIBITION."

**PRESUMPTIONS OF LAW.** See "APPEAL AND ERROR," "EVIDENCE," "NEGLECTENCE."

**PROHIBITION.**

**HEARING OF PREMATURE APPEAL.** Prohibition is the proper remedy to prevent the district court from hearing an appeal from a city court taken prematurely. *Thornton et al. v. Evans, Judge, et al.*, 268.

**PROXIMATE CAUSE.** See "INDEPENDENT CONTRACTOR."

**PUBLIC LANDS.**

**REQUIREMENT THAT PREFERENCE RIGHT APPLICATION FOR PURCHASE OF SCHOOL LAND "MUST" BE MADE WITHIN NINETY DAYS OF FILING OF PLAT NOT MANDATORY.** Failure of occupant of school state lands claiming under original settlers to make preference right application to purchase land within ninety days after plat has been filed, under Comp. Laws 1917, section 5588, providing that application "must" be made within such time, does not preclude state board of land commissioners from issuing certificate of sale where no other application has been made between date of filing of plat and making of occupant's application; the word "must" not being mandatory in view of Rev. St. U. S. section 2266. *Hamblyn v. State Board of Land Commissioners*, 462.

QUESTIONS OF FACT. See "APPEAL AND ERROR," "LANDLORD AND TENANT," "MASTER AND SERVANT."

#### RAILROADS.

1. FAILURE TO LOOK NOT CAUSE OF CROSSING ACCIDENT. Where plaintiff's automobile, stalled on the tracks by reason of a defective crossing, was struck by an engine driven without lookout, his failure to look and listen before going on the track cannot be held to have been the cause of the injury. *Cottam v. Oregon Short Line R. Co.*, 330
2. DUTY TO LOOK AND LISTEN RECIPROCAL. Person operating a railroad engine and an automobile driver attempting to use a railroad crossing have a reciprocal duty to look and listen. *Cottam v. Oregon Short Line R. Co.*, 330.

#### RAPE.

1. GENERAL REPUTATION OF PROSECUTRIX FOR UNCHASTITY COMPETENT WHERE SEXUAL ACT IS ADMITTED. Where defendant in prosecution for rape by force admits the sexual act, or contends that the prosecutrix consented thereto, evidence that the general reputation of the prosecutrix for chastity was bad is admissible. *State v. Scott*, 553.
2. PROOF OF UNCHASTITY OF PROSECUTRIX INADMISSIBLE IN STATUTORY PROSECUTION. It is inadmissible in a prosecution for statutory rape, where sexual intercourse is had with a female under the age of consent, to prove that the general reputation of the prosecutrix for chastity is bad. *State v. Scott*, 553.
3. PROOF OF SPECIFIC UNCHASTE ACTS ON THE PART OF PROSECUTRIX INADMISSIBLE. If it is desired to prove that a prosecutrix in a rape case is a lewd woman, that may only be done by attacking her general reputation for chastity and morality, and not by showing specific acts of wrongdoing. *State v. Scott*, 553.
4. PROOF OF FEMALE'S UNCHASTITY NOT COMPETENT WHERE ACCUSED DENIES ANY SEXUAL RELATIONS. In a rape case, where defendant denied that he was with the prosecutrix on the night in which he was alleged to have committed the wrongful act, or that he ever had sexual intercourse with her, accused was not entitled to prove that the general reputation of the prosecutrix for chastity was bad, at least when not introduced for the purpose of affecting the credibility of the prosecutrix. *State v. Scott*, 553.

RATIFICATION OF VOID ACTS. See "CORPORATIONS."

RECEIVER'S AUTHORITY. See "BANKS AND BANKING."

REPUTATION OF WITNESS. See "CRIMINAL LAW," "RAPE."

#### REFORMATION OF INSTRUMENTS.

1. PROOF OF MUTUAL MISTAKE TO AUTHORIZE REFORMATION MUST BE CONVINCING. Mutual mistakes can be corrected, and courts will

reform a contract so as to express what the parties actually agreed on and make it express the terms on which the minds of both parties met, but the proof must be clear, distinct, satisfactory, and convincing, and not merely a preponderance of the evidence. *Cram et al. v. Reynolds*, 384.

2. MISTAKE IN OMISSION FROM CONTRACT OF WATER RIGHTS OR STOCK SHOWN BY EVIDENCE. Evidence held to show that written contract for the sale of land by defendants to plaintiffs omitted certain water rights or shares of stock in an irrigation company by mutual mistake of the parties known to and fraudulently relied upon by a defendant. *Cram et al. v. Reynolds*, 384.

#### REPLEVIN.

1. SUFFICIENCY OF ALLEGATIONS AS TO POSSESSION. Complaint, in action in claim and delivery, held defective in failing to allege plaintiff's right to possession of the property at the time of bringing the action. *Bush v. Bush et ux.*, 237.
2. RIGHT OF OWNER TO BRING ACTION. Owner has no right to bring action in claim and delivery, unless he is entitled to immediate possession of the property. *Bush v. Bush et ux.*, 237.
3. PLEADING OF RIGHT OF POSSESSION. Complaint in action in claim and delivery should state facts from which it may be inferred with reasonable certainty that plaintiff is entitled to possession of property at time of commencement of action; an allegation of ownership being insufficient, inasmuch as owner may not be entitled to possession. *Bush v. Bush et ux.*, 237.
4. ELEMENTS OF ACTION IN ACTION IN CLAIM AND DELIVERY. The essential elements of an action in claim and delivery are the same as in the common-law action of replevin. *Bush v. Bush et ux.*, 237.

RESCISSION OF CONTRACT. See "CONTRACTS," "VENDOR AND PURCHASER."

RES IPSA LOQUITUR. See "MASTER AND SERVANT."

RIGHTS OF VEHICLES. See "MUNICIPAL CORPORATIONS."

#### SALES.

1. RELEASE CONSTRUED. A clause in a "guaranty contract," in which a seller warranted a stallion to be serviceably sound, "this contract expires, and the seller is hereby released from any further obligations to the purchasers after April 1, 1915," had the effect of releasing the seller from any duties or defaults occurring after April 1, 1915, but did not prevent the purchasers from suing for defaults occurring prior to such date. *Clark et al. v. Lund*, 284.
2. RELEASE FROM FURTHER LIABILITY NOT COVENANT TO REFRAIN FROM SUIT. A clause in a "guaranty contract," in which a seller represented and warranted a stallion, "this contract ex-

pires, and the seller is hereby released from any further obligations to the purchaser after April 1, 1915," was not a covenant or agreement not to sue on the contract after April 1, 1915. *Clark et al. v. Lund*, 284.

#### SCHOOLS AND SCHOOL DISTRICTS. See "MANDAMUS."

1. TAX LEVY LIMITED TO SEVEN MILLS, INCLUDING SCHOOL SITES. Tax levies for county school districts of the first class should be made without regard to the proviso of Comp. Laws 1917, section 4624, which is void for making discriminatory classifications of property valuation in regulating maximum assessment for any year, but should be made in accordance with Laws 1911, chapter 135, amending Comp. Laws 1907, section 1891x27, limiting the assessment to five and one-half mills, with an additional one and one-half mills exclusively for purchase of school sites and erection of buildings. *Board of Education of Granite School Dist. v. Stillman*, 125.
2. AWARD OF COMPENSATION NEED NOT BE VERIFIED OR AUDITED. Compensation awarded a school teacher under the Workmen's Compensation Act is a liquidated claim partaking of the nature of a judgment against the school district, and the board has no discretion respecting its allowance or payment, and hence it need not be verified or audited. *Woodcock v. Board of Education of Salt Lake City*, 458.
3. NOT LIABLE FOR PERSONAL INJURIES. Actions for damages for personal injuries will not lie against school districts; such districts being corporations with limited powers which act merely on behalf of the state in discharging the duty of educating the children of school age in the public schools created by the general laws. *Woodcock v. Board of Education of Salt Lake City et al.*, 458.

#### SPECIFIC PERFORMANCE.

1. OPTION SUFFICIENTLY DEFINITE REGARDING TIME OF PAYMENT. An option to purchase land providing that one-fourth of the price should be paid in cash, one-fourth on or before a specified date, and "balance ten years time at eight per cent. per annum," was sufficiently definite as to the time of payment of principal and interest to justify specific performance. *Thomas v. Johnson*, 424.
2. OPTION NOT FATALY UNCERTAIN. An option to purchase land providing for the transfer of title subject only to such liens and incumbrances as were to be assumed implied some form of security, and was not too indefinite to be specifically enforced in the absence of any showing that the security contemplated was inadequate. *Thomas v. Johnson*, 424.

#### STATUTES.

1. INTENT MUST BE GIVEN EFFECT. Unless there is some constitutional or other fundamental objection, it is the duty of the courts to place such a construction upon the different provisions of the statutes as will make the legislative intention effective, unless prevented from doing so by the ordinary rules and canons

of interpretation and construction. *Woodcock v. Board of Education of Salt Lake City et al.*, 458.

2. **TITLE OF ACT AUTHORIZING RECEIVER TO ENFORCE DOUBLE LIABILITY ON BANK STOCK.** The provisions authorizing a receiver of an insolvent bank to enforce the double liability of stockholders, found in section 34 of the General Banking Act, is not a separate and distinct subject from the general act. *Lynch v. Jacobsen*, 129.
3. **EXPRESS MENTION AND IMPLIED EXCLUSION.** The maxim "Expressio unius est exclusio alterius," is merely a technical rule of construction and cannot be used to thwart or subvert the obvious intention of the Legislature, and is properly applied only when the legislative intent is not plainly expressed. *Booth v. Midvale City*, 220.

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## TRIAL. See "CRIMINAL LAW."

1. **ERROR IN REFUSING INSTRUCTION NOT CURED BY INSTRUCTION GIVEN.** In an action for breach of a contract to deliver lambs wherein defendant claimed that only wether lambs raised from his own herd were to be included, refusal of an instruction that the contract did not contain such a limitation *held* not cured by another instruction merely to the effect that the breach of the contract gave rise to a cause of action for damages; such instruction being in no sense an interpretation of the legal rights of the parties. *Armstrong v. Larsen*, 347.
2. **INSTRUCTION SUBMITTING ISSUE OF BREACH OF CONTRACT, NOT APPLICABLE TO ISSUE, ERROR.** In an action for breach of a contract to deliver lambs, where defendant while admitting the breach claimed the subsequent contract provided merely for the delivery of wether lambs born of his own herd, instructions submitting the issue of breach to the jury *held* erroneous. *Armstrong v. Larsen*, 347.
3. **MOTION FOR DIRECTED VERDICT MUST SPECIFY INSUFFICIENCY OF EVIDENCE.** Where defendant's motion for directed verdict was wholly general and did not specify wherein the evidence was insufficient, the overruling of the same could not place the trial court in error. *Hansen v. Oregon Short Line R. Co.*, 577.
4. **RULE AS TO POINTING OUT INSUFFICIENCY OF THE EVIDENCE DISTINGUISHED FROM REQUIREMENT ON MOTION FOR DIRECTED VERDICT.** Court rule 26, 54 Utah XV., (97 Pac. x), providing that, when the alleged error is on the ground of the insufficiency of the evidence to sustain or justify the verdict, the particulars shall be specified, is applicable to the Appellate Court, and has no application to the rule of practice requiring party moving for directed verdict to point out the insufficiency of the evidence. *Hansen v. Oregon Short Line R. Co.*, 577.
5. **TESTIMONY ASSUMED TRUE ON NONSUIT.** Testimony for plaintiff must be assumed to be true on motion for nonsuit. *Vallotis v. Utah-Apex Mining Co.*, 151.
6. **IMPEACHMENT BY SHOWING CONTRADICTORY STATEMENTS.** A statement signed by a witness and containing statements of fact inconsistent with his testimony is competent only for purpose of impeachment, and therefore raises a question of credibility of the witness for jury and not the court to decide. *Vallotis v. Utah-Apex Mining Co.*, 151.
7. **NONSUIT IMPROPER IN FACE OF SUSTAINING TESTIMONY.** Court properly overruled motion for nonsuit where plaintiff's evidence tended to prove his cause of action. *Vallotis v. Utah-Apex Mining Co.*, 151.
8. **PLAINTIFF ENTITLED TO INFERENCES ON MOTION FOR NONSUIT.** On motion for nonsuit, court must give to the plaintiff the benefit of every fair and reasonable inference that might properly be drawn from the evidence by the jury. *Vallotis v. Utah-Apex Mining Co.*, 151.
9. **TRIAL—NECESSITY OF REQUEST FOR INSTRUCTIONS.** If it was the contention of employer, being sued for injuries to employé from

broken rung in ladder, that question of whether broken rung rendered ladder unsafe, was for jury, such idea should have been embodied in a proper request. *Valiottis v. Utah-Apex Mining Co.*, 151.

10. INSTRUCTIONS SINGLING OUT FACTS IMPROPER. In action for injuries to employé, instruction *held* properly refused, in that by singling out certain facts which the evidence tended to prove it invaded province of jury. *Valiottis v. Utah-Apex Mining Co.*, 151.
11. OFFER OF PROOF STANDS IN SAME POSITION AS PLEADING. An offer of proof stands in the same position as a pleading, and if it is in any sense contradictory it will be construed when presented against him who relies upon it. *Roe v. Schweitzer*, 204.
12. DISCRETIONARY WITH COURT TO GRANT TRIAL BY JURY WHERE ISSUES ARE PURELY EQUITABLE. Where issues to be tried are purely equitable, the question of granting trial by jury is one wholly within the discretion of the court. *In re Helin's Estate*, 572.

ULTRA VIRES ACTS. See "CORPORATIONS," "MUNICIPAL CORPORATIONS."

#### VENDOR AND PURCHASER.

1. TENDER OF PRICE NOT REQUIRED WHERE VENDER REPUDIATES CONTRACT. Under an option for the sale of land providing that, if the optionee should offer to comply with the terms of payment, the optionor would convey and furnish an abstract, a tender of the price by the optionee was unnecessary where he offered to proceed with the agreement, and the optionor, instead of furnishing an abstract, repudiated the contract and said there was no contract. *Thomas v. Johnson*, 424.
2. NOMINAL CONSIDERATION FOR OPTION SUFFICIENT. One dollar is an adequate consideration for an option to purchase land if the consideration for the purchase of the land is adequate. *Thomas v. Johnson*, 424.
3. RESCISSION FOR DEFAULT OF VENDORS RELIEVES PURCHASER FROM FUTURE PAYMENTS. Where defendants, vendors, agreed to make, when due, a payment to become due the United States on the land sold, and defaulted therein, and secured an extension of time for such payment, and demanded that plaintiff purchaser pay the same, plaintiff could then rescind and demand return of his money paid, and he was not required to pay vendors a sum subsequently becoming due under the purchase contract. *Pool v. Motter*, 288.

VERDICT SET ASIDE. See "NEW TRIAL."

VEXATIOUS ACTIONS. See "Costs."

WAIVER OF NOTICE. See "INFANTS."

#### WATERS AND WATER COURSES.

1. EVIDENCE SUPPORTING JUDGMENT DETERMINING OWNERSHIP OF

**WATER FILING.** In suit for decree adjudging plaintiffs to be the owners of a water filing made by an individual defendant, and quieting title thereto against him and his successor, the corporate defendant, also annulling the individual defendant's assignment of the filing to the corporate defendant, evidence held to support finding that the corporate defendant had notice of plaintiff's interest in the water filing. *Bracken et al. v. Chadburn*, 430.

2. **ASSIGNEE OF WATER FILING WITH NOTICE TOOK SUBJECT TO ADVERSE RIGHTS.** A reclamation company, which accepted assignment of a water filing with notice of an adverse interest therein, took subject to all the equities and rights of the adverse parties. *Bracken et al. v. Chadburn*, 430.

**WILLS.** See "EXECUTORS AND ADMINISTRATORS."

**WITNESSES.** See "EVIDENCE," "CRIMINAL LAW."

1. **CROSS-EXAMINATION OF DEFENDANT BY REPEATING TESTIMONY OF PROSECUTRIX HELD IMPROPER.** Where accused on his examination in chief denied the rape, and denied that he was with the prosecutrix on the occasion testified to by her, it was error for the prosecuting attorney on cross-examination to repeat in his questions all that was testified to by prosecutrix by asking numerous questions in each one of which some fact or facts stated by her were included. *State v. Scott*, 553.
2. **IMPROPER FOR PROSECUTING ATTORNEY TO CROSS-EXAMINE CHARACTER WITNESS AS TO OWN CHARACTER.** In a prosecution for rape, where defendant produced a witness to testify that the general reputation of the prosecutrix for truth and veracity was bad, it was error for the court on cross-examination to permit the prosecuting attorney to ask the witness as to what his reputation was in the community for truth and veracity; his own reputation being foreign to matter testified to in chief. *State v. Scott*, 553.
3. **STATE MAY NOT IMPEACH OWN WITNESS BY SHOWING REPUTATION, BUT MAY SHOW INCONSISTENT STATEMENTS.** The state may not impeach its own witness by showing his general reputation for truth and veracity, but, where a witness makes conflicting statements, may call his attention to such statements, and in case he has misled or deceived the state to its prejudice, it may, under certain circumstances, produce the persons who heard him make the statements which conflict with his testimony, and show by them what the witness said. *State v. Scott*, 553.
4. **ERROR TO PERMIT PROSECUTOR TO INTERROGATE OWN WITNESS FOR PURPOSE OF IMPEACHMENT.** The court erred in permitting prosecuting attorney to interrogate a witness for the state for the purpose of impeachment by showing inconsistent statements, where the witness made no contradictory statements, and had not misled the state as to what his testimony would be. *State v. Scott*, 553.
5. **COLLATERAL FACTS MAY SOMETIMES BE SHOWN ON CROSS-EXAMINATION OF DEFENDANT TO A LIMITED DEGREE.** While collateral facts

may very often be shown on cross-examination to affect the credibility of an accused, and while such matters are largely within the sound discretion of the trial courts, there must be a limit to the introduction of collateral matter. *State v. Scott*, 553.

6. **IMPROPER TO PERMIT CROSS-EXAMINATION OF ACCUSED IN RAPE CASE CONCERNING DIVORCE FROM WIFE.** In a prosecution for rape, cross-examining defendant with respect to his obtaining a divorce from his first wife, and when he obtained it, thereby intimating that he had commenced keeping company with his present wife before he had obtained the divorce from his first wife, was entirely collateral to any issue in the case. *State v. Scott*, 553.
7. **PROOF OF INTERCOURSE WITH THIRD PERSON SOMETIMES COMPETENT TO SHOW MOTIVE OF PROSECUTING WITNESS.** In a prosecution for rape, where it was the theory of defendant that prosecutrix had intercourse with a third person, and that, to shield herself in view of supposed pregnancy, she wrongfully charged defendant with the offense, the accused had the right to prove by the prosecutrix on cross-examination that such was her purpose in lodging the complaint, and to establish that fact, could prove that she had had intercourse with such third person. *State v. Scott*, 553.
8. **STATE CANNOT ASSAIL OWN WITNESS FOR PURPOSE OF IMPEACHING.** In a criminal prosecution, when a dealer testified as to time that accused bought certain articles from him, and defendant on cross-examination introduced a sales slip showing a sale of the articles on a date other than that contended by the state to be the date of the sale, the court erred in permitting the state to assail the dealer and interrogate him for the purpose of impeachment, or to reflect upon the motives of the witness and his veracity, merely because the dealer insisted that the date on the sales slip was the date upon which the transaction was had. *State v. Scott*, 553.
9. **STATE MAY IMPEACH CHARACTER WITNESS.** The state has the right to impeach a witness produced by defendant, in a prosecution for rape to testify as to the female's reputation for truth and veracity, by showing that his general reputation for truth and veracity is bad, or can assail his credibility by the usual methods. *State v. Scott*, 553.

Ex. 11.  
9.20.21















